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No. _____

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1991

Senator FRED A. RISSER and
Representative DAVID M. TRAVIS,

Petitioners,

vs.

TOMMY G. THOMPSON, Governor
of the State of Wisconsin,

Respondent.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For the Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

FREDERICK B. WADE
Counsel of Record

Suite 804
122 West Washington Avenue
Madison, WI 53703
(608) 255-5111

Attorney for Petitioners

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

1. Is an executive entitled to absolute legislative immunity from a suit under 42 U.S.C. § 1983, which alleges that he has deprived persons of rights that are secured by the Constitution, by using his authority to veto "part" of an appropriation bill as a means of composing and enacting statutes that do not have the consent of the representatives of the people in the legislature?

2. Does the concept of liberty embodied in the due process clause of the Fourteenth Amendment, or the guarantee of a republican form of government to the people of each State, secure the right of state citizens to give or withhold consent to the enactment of statutes by a vote in a representative body, in which consent to enactment is expressed by at least a majority of the votes cast by a quorum of their elected representatives, whenever there is no opportunity for qualified electors to participate personally in the act of giving or withholding such consent?

3. Does the equal protection clause of the Fourteenth Amendment or the First Amendment, or both, secure the right of state citizens to give or withhold consent to the enactment of statutes by prohibiting use of the "part" veto as a means of composing and enacting statutes, which cannot be rejected without a supermajority of two-thirds of the members in each house of the legislature?

PARTIES

The petitioners, who were the plaintiffs and the appellants in the proceedings below, are State Senator Fred A. Risser and State Representative David M. Travis. Senator Risser is the President of the Wisconsin Senate. Representative Travis is the Majority Leader of the Wisconsin Assembly.

The respondent is Tommy G. Thompson, the Governor of the State of Wisconsin.

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Petition For A Writ Of Certiorari To The United States Court Of Appeals For the Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

The petitioners respectfully pray that a writ of certiorari issue to review the judgment and opinion rendered in this case by the United States Court of Appeals for the Seventh Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals has been reported at 930 F.2d 549 (1991) and is reprinted *infra* at App. 1a-13a. The opinion of the District Court (App. 16a-37a) has not been reported.

JURISDICTION

The judgment of the Court of Appeals was entered on April 16, 1991. App. 14a. A petition for rehearing, with a suggestion for rehearing *en banc*, was filed on May 3, 1991, and denied on May 17, 1991. App. 15a.

The jurisdiction of this Court rests on 28 U.S.C. §§ 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

This case involves the due process and equal protection clauses of the Fourteenth Amendment, the First Amendment, and the Guarantee Clause which is contained in Article IV of the Constitution. App. 84a. It also involves Article V, § 10 of the Wisconsin Constitution. App. 84a-86a.

The case is brought under 42 U.S.C. § 1983. App. 87a. It challenges the constitutionality of provisions of the Wisconsin Statutes that are numbered as follows: 15.155(3); 15.157(1); 46.48(19); 48.355(6); 49.19(11)(a)1.a.; 84.013(3)(xb); 121.02(1)(L)5; 121.10(3); 144.442(1s); 144.445(8)(b) 1 m.; 157.70(2)(a); and 166.20(11)(b). App. 87a-94a.

STATEMENT OF THE CASE

1. Wisconsin gives its executive a power "to approve or veto" every appropriation bill that has passed the Legislature, either "in whole or in part." App. 84a-85a. The "part" veto was created by a 1930 amendment to the Wisconsin Constitution in order to permit

governors to delete "particular *provisions*" from bills dealing with more than one subject, "when the particular *provisions could not pass* [the Legislature] on their separate merits. . . . " (emphasis added). *State ex rel. Martin v. Zimmerman*, 233 Wis. 442, 448, 289 N.W. 662, 664 (1940).

However, the power to veto "parts" is not limited to the approval or deletion of whole provisions or items. *State ex rel. Wisconsin Senate v. Thompson*, 144 Wis.2d 429, 440, 450-451, 462; 424 N.W.2d 385, 389, 393, 396 (1988). The Wisconsin Supreme Court has held that the dictionary definition of a "part" permits the Governor to delete letters of words, digits of numbers, words such as "not", and phrases of a sentence from enrolled bills that have been passed by the Legislature. *Id.*

Acting under color of this interpretation, the Governor has used the veto as a means of deleting selected parts from the text of enrolled appropriation bills in order to compose new provisions from fragments that he did not veto. *Id.*, 144 Wis.2d at 448-452, 456, 465; 424 N.W.2d at 392-394, 396, 399; *See* App. 87a-94a. This conduct is distinguishable from the deletion of a whole provision or item, because it creates a new proposal for legislation that is either contrary to the manifest intent of the corresponding provision in the text of an enrolled bill, or that differs in a material respect from the corresponding provision that the Legislature passed. *Id.* Yet, the Governor's compositions are deemed to be enacted into law when he gives his approval to the parts that he did not veto, despite the fact that the new provisions have neither been considered, nor passed, by each house of the Wisconsin Legislature. *Id.*

There is no opportunity for legislators to *reject* the statutes that the executive has fashioned by a majority of

the votes cast in either the Senate or the Assembly. The requirement of a two-thirds vote – to override vetoes that the Governor used to compose new statutes – has the effect of requiring a supermajority in each chamber in order to *disapprove* a statute that has already been enacted without their consent. *See* App. 1a-2a, 11a.

In this manner, the Legislature is prevented from performing the traditional function of giving or withholding the consent of the people to the enactment of statutes. However, the Wisconsin Supreme Court has failed to articulate any state interest whatsoever that is served by depriving the people of the opportunity to give or withhold such consent, as distinguished from the original (and legitimate) purpose of preventing the enactment of whole provisions or items that could not have passed the Legislature if they had been put to a separate vote. *See Wisconsin Senate v. Thompson, supra,* and the cases cited therein.

2. The petitioners contend that the Constitution secures the right of the state citizens to give or withhold consent to the enactment of statutes, through their elected representatives in a legislative assembly, whenever there is no opportunity for qualified electors to participate personally in the act of giving or withholding such consent.[1] Accordingly, the Complaint alleges that the

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[1] As explained in more detail *infra,* the Founders of our nation viewed "[t]he scheme of representation [in a legislative body] as a substitute for a meeting of the citizens in person," in which each elector would have an opportunity to participate personally in the act of giving or withholding consent. J. Cooke, ed., *The Federalist,* 355 (1961) [hereinafter cited as Cooke].

Governor composed the enacted twenty statutes without the consent of the Legislature (*See* App. 87a-94a), and that this conduct violated the due process and equal protection clauses of the Fourteenth Amendment, the First Amendment, and the Guarantee Clause. The Complaint asks for declaratory relief and an injunction against future violations.

The jurisdiction of the district court was invoked under 28 U.S.C. 1331 and 42 U.S.C. 1983. Standing was asserted on the basis of the plaintiffs' status, both as members of the Legislature (*See* App. 3a-4a, 26a), *and* as voters who had actually cast votes for representation in the Legislature.[2]

On June 14, 1990, petitioners filed a motion for partial summary judgment, which was supported by five affidavits. Three of the affidavits were submitted by experts in the field of American constitutional history, in order to demonstrate that the Founders' concepts of liberty and republican government embraced the principle of legislative consent to statute law. *See* App. 39a-83a; n. 4, *infra*.

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[2] In asserting standing as voters, the petitioners relied on decisions of this Court which recognize that *voters* have standing to challenge infringement of their personal interest "'in maintaining the effectiveness of their votes'" for representation. *Baker v. Carr*, 369 U.S. 186, 208 (1962) *quoting Coleman v. Miller*, 307 U.S. 433, 438 (1939); *See Reynolds v. Sims*, 377 U.S. 533, 537, 541-542 (1964); *Board of Estimate of City of New York v. Morris*, 489 U.S. 688, 690 n. 1, 693 (1989); *compare Morris v. Board of Estimate*, 551 F.Supp. 652, 653 n. 2 (E.D.N.Y., 1982). Neither of the lower courts addressed this basis for standing. App. 3a-4a, 26a.

The Governor also moved for summary judgment. However, he did not controvert any of the affidavits that the petitioners submitted.

3. On August 24, 1990, District Judge John C. Shabaz determined that "there are no material facts in dispute," that no affirmative defense precluded the suit, and that "the merits are significant and should be resolved. . . . " App. 16a, 21a-26a. However, he treated the evidence in the three affidavits submitted by the petitioners' experts, and 172 pages of exhibits to those affidavits, as if it consisted of nothing more than a single quotation from a single source. App. 36a. He proceeded to deny the plaintiffs' motion, grant the Governor's motion, and dismiss the Complaint. App. 37a-38a.

4. The Court below concedes that the Governor has changed the intent of provisions that were presented for his approval. App. 2a. It agrees he has created "laws that the Legislature did not consider, let alone enact." App. 11a. It declares that Wisconsin has decided to proceed down a road that leads to "rule by executive decree, with no Legislature at all." App. 12a.

Nevertheless, it affirmed the dismissal of the Complaint without any apparent evaluation of the historical evidence that the petitioners presented with respect to the concepts of liberty and republican government. *See* App. 1a-13a, 39a-83a. The Court held that the executive is entitled to absolute legislative immunity (App. 4a-5a), and that there is "no federal judicial remedy" for the challenged conduct. App. 12a.

For the Court below, Wisconsin's reallocation of power from the Legislature to the Governor is a zero-sum game, in which nothing of importance has been lost. The people " 'speak' through their governor *in the same sense*

and to the same extent as they do through their legislators." (emphasis added) App. 9a. "All that the creative veto power does is shift power from one . . . " body to another. App. 10a. And the reduction of the legislature's power is balanced by "an equal and offsetting increase in the governor's . . . legislative power. . . . " App. 9a.

The implicit conclusion is that legislatures do not perform the function of expressing the consent of the governed to the enactment of statutes. Nor is there any principle of liberty or self-government that requires such consent. Thus, the opinion below constitutes a repudiation of the petitioners' central premise that popular or legislative consent to the enactment of a statute is the very essence of the concepts of liberty and self-government that gave birth to our nation.

REASONS FOR GRANTING THE WRIT

1. This case squarely presents an important question that should be, but which has not yet been decided by this Court. That question is whether the Constitution secures the right of state citizens to give or withhold consent to the enactment of statutes, either by voting for or against proposed legislation in person, or, as is customary, by a vote in a representative body, in which consent is expressed or withheld by at least a majority of the votes cast by a quorum of the elected representatives.

The national importance of this fundamental issue is evident in the decisions of this Court and in the history and traditions of our people. However, no decision of this Court is either dispositive, or directly controlling.

1.a. This Court has recognized that the right of self-government is a "fundamental principle" that constitutes

"the bedrock of our political system." *In re Duncan*, 139 U.S. 449, 461-462 (1891); *Reynolds v. Sims*, *supra* n. 2, 377 U.S. at 562, 565. The "distinguishing feature" of our system of representative self-government "is the right of the people to . . . pass their own laws in virtue of the legislative power reposed in representative bodies. . . . " *In re Duncan*, *supra*, 139 U.S. at 461. This right is based on a recognition that the "legitimate acts" of representative assemblies are "those of the people themselves. . . . " *Id.* Accordingly, as Justice Kennedy concluded in his concurring opinion for four members of this Court in *Missouri v. Jenkins*, ___ U.S. ___, 110 S.Ct. 1651, 1671 (1990), the exercise of power by a representative body "is a direct manifestation of the citizens' consent."

Moreover, as this Court has made clear on two occasions, self-government is a personal right:

> [I]n this country, the people govern themselves through their elected representatives and . . . 'each and every citizen has an inalienable right to full and effective participation in the political processes' of the legislative bodies of the Nation, State or locality as the case may be.

Board of Estimate of City of New York, *supra* n. 2, 489 U.S. at 693; *See Reynolds v. Sims*, *supra*, n. 2, 377 U.S. at 565. Each citizen possesses a " 'portion of sovereign power,' " which is customarily exercised through representatives in a legislative assembly, rather than by direct personal participation in the act of giving or withholding consent. *Id.*

This Court emphasized the importance of self-government when it explained that "[t]he protection given speech and press [and assembly] was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people." *Roth*

v. United States, 354 U.S. 476, 484 (1957). These "indispensable democratic freedoms" are deemed to be "fundamental rights which are safeguarded by the due process clause of the Fourteenth Amendment," *because* they are essential pillars of our system of self-government. *Thomas v. Collins*, 323 U.S. 516, 530 (1945). *DeJonge v. Oregon*, 299 U.S. 353, 364 (1937). *See Bates v. City of Little Rock*, 361 U.S. 516, 522-523 (1960).

Moreover, voting has been deemed to be " 'a fundamental right' " *because* representative government is "self-government through the medium of elected representatives of the people. . . . " *Reynolds v. Sims, supra* n. 2, 377 U.S. at 562, 565. As a result, "fair and effective *representation*" means more " 'than the right to mark a piece of paper and drop it in a box. . . . ' " (emphasis added) *Id.* at 565, 555 n. 29. (citation omitted). A vote for legislative representation is part of a continuum that extends from apportionment, to a free election, to a fair count, to the ultimate act by which consent to the enactment of a statute is given or withheld by a majority of the votes cast in a representative body. Thus, "[f]ull and effective participation by all citizens in state government requires . . . that each citizen have an equally effective voice in the election of members of his [or her] state legislature" *because* that is the only practical means for "[m]ost citizens" to exercise the personal portion of sovereign power that they possess as qualified electors. *Id.* at 565; *See Board of Estimate of City of New York v. Morris, supra* n. 2, 489 U.S. at 693.

1.b. As Joseph Story, declared in his *Commentaries on the Constitution*, the Founders of our nation considered it to be " 'a fundamental principle of a free government, and especially of a republican government, that no laws

ought to be passed without the cooperation and consent of the representatives of the people. . . . ' " App. 64a-65a. "[C]onsent to statutory law either in person or by representation, *was the test* for determining the existence of liberty [that was] most commonly stated. . . . " (emphasis added). J. Reid, *The Concept of Liberty in the Age of the American Revolution* 80 (1988) [hereinafter cited as Reid].

The principle of legislative consent to statute law was recognized as a fundamental part of the English Constitution for 450 years before the outbreak of the American Revolution. It was established as early as 1322, and was repeatedly reaffirmed during the centuries that followed. App. 46a; *See* App. 44a-51a; B. Schwartz, *The Roots of Freedom: A Constitutional History of England*, 49, 54, 73-75, 79-81, 85-87, 131, 145, 162, 180, 190-193, 197-199 (1967). As William Blackstone concluded in 1765, "the *consent* of all three [Commons, Lords and King] is required to make *any new law* that shall bind the subject." (emphasis added) App. 44a-45a.

The people of England had the "privilege of rejecting" legislation by virtue of their representation in the House of Commons. App. 45a; *See* App. 44a-51a. According to Blackstone, this "privilege" was based on the premise that, "[i]n a free state every man, who is supposed a free agent, ought to be in some measure his own governor; and therefore a branch *at least* of the legislative power should reside in the whole body of the people." (emphasis added) App. 45a.

When the First Continental Congress claimed that the colonists were entitled to the rights of Englishmen in 1774, it asserted that "the foundation of English liberty, and of *all free government*, is the right in the people to participate in their legislative council. . . . " App. 53a; *See*

App. 51a-60a. Congress concluded that, "as the English colonists are not represented . . . in the British parliament, they are entitled to a free and exclusive power of legislation in their several provincial legislatures. . . . " *Id.*

By 1776, Americans had progressed from denial of the power to tax without representation to a denial of all British authority " 'to bind them by its laws.' " App. 53a. Thus, when the Declaration of Independence asserted that governments derive their "just powers from the consent of the governed," included specific statutes that the King and Parliament had purported to enact among the list of colonial grievances, and declared those laws to be nothing more than "acts of pretended legislation" (App. 55a-56a), it was asserting the basic principle "that no laws have any validity, or binding force, without the consent and approbation of the *people*, given in the persons of *their* representatives. . . . " (emphasis in original). *See* 1 H. Syrett, ed., *The Papers of Alexander Hamilton* 105 (1961) [hereinafter cited as Syrett]; *See* App. 51a-60a.

"It is . . . certain," Alexander Hamilton wrote, "that no Englishman, who can be deemed a *free agent* . . . can be bound by laws to which he has not consented, either in person, or by *his* representative." (emphasis in original) *Id.* Americans argued, in constitutional terms, that they could no longer " 'be considered as a free people . . . [because] they are subject to laws and regulations not of their own making. . . . ' " Reid, *supra*, 94.

This idea of liberty "was shared by all literate English-speaking people . . . " of the period. Reid, *supra*, 49, 98. It was the very heart of the consensus among the Founders of our nation.

Independence prompted Americans to translate the concepts of liberty and self-government into written constitutions. *See* W. Adams, *The First American Constitutions*, xvii (1980). The first constitutions of Maryland (1776) and Delaware (1776) declare that " 'the Right in the People to participate in the Legislature is the Foundation of Liberty, and of all free Government.' " *Id.* 157; *See* App. 57a. Those of Virginia (1776), Pennsylvania (1776) and Massachusetts (1780) state, in virtually identical terms, that no statute may be enacted without the consent of either the people themselves, or their representatives in a legislative assembly. App. 58a-60a. In addition, each state constitution that was adopted before 1787 embodies the principle of legislative consent to statute law in its prescription for legislative action, whether or not it is declared to be a fundamental premise of free government. App. 58a-60a.

As the Continental Congress declared in 1774, "the first grand right" in the pantheon of American values "is that of the people having a share in their own government by their representatives . . . and, in consequence, of being ruled by *laws*, which they themselves approve, not by edicts . . . . " (emphasis in original). 1 *Journals of the Continental Congress* 107 (1774). This "grand right" is one of those "invaluable rights . . . without which a people cannot be free . . . . " *Id.* at 108.

1.c. The Founders recognized that legislative consent to statute law was a substitute for the right of each citizen to participate personally in the act of giving or withholding consent. As John Adams explained, a free state presupposes that "every man is his own legislator" because "[t]he very definition of a freeman is one who is bound by no law to which he has not consented." 4 C. F.

Adams, ed., *The Works of John Adams*, 401, 28 (1851) [hereinafter cited as Adams]. Accordingly, "[t]here can be no free government without a democratical branch in the constitution" to perform the function of expressing the consent of the governed to the enactment of statutes. *Id.* 289.[3]

As James Wilson explained, when there is "a free and adequate representation" of the people in a legislative body, "there is no difference between that which is done by the people in their own persons, and that which is done by their deputies . . . . " 1 R. McCloskey ed., *The Works of James Wilson* 405 (1967). It is "as if every citizen were [permitted] to deliberate [with respect to the enactment of a proposed statute] . . . and to vote [on enactment] in person." *Id.* at 405; *See* 1 M. Farrand, *The Records of the Federal Convention* (Rev. ed.) 132-133 (1937) [hereinafter cited as Farrand]; *See also City of Eastlake v. Forest City Enterprises*, 426 U.S. 668, 672-673 (1976).

James Madison agreed that representation of the citizens in at least one branch of a legislative body was "essential to every plan of free Government." 1 Farrand, *supra*, 49; *See* Cooke, *supra*, 355. As noted *supra* n. 1, he viewed "[t]he scheme of representation as a substitute for a meeting of the citizens in person . . . . " Representation was a means of permitting the citizens to "assemble and administer . . . [the government] by their representatives

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[3] If each qualified elector has a right to participate in the act of giving or withholding consent, and *consent* may be given or withheld only by a majority, there must be a mechanism for determining what the majority desires. Therefore, the function of giving or withholding consent cannot be performed by one person (although legislative power may be delegated by statute, with consent, if adequate standards are prescribed. *See Yakus v. United States*, 321 U.S. 414, 426 (1944)).

and *agents*." (emphasis added) Cooke, *supra*, 84; *See* 1 Farrand, *supra*, 132-133. As a result, apportionment according to population was "understood to refer to the personal rights of the people." Cooke, *supra*, 366.

1.d. The Founders also equated participation in the legislature, through representation, with the concept of liberty. As John Adams declared, civil liberty consists of " 'the power of a civil society to govern itself . . . by laws of its own making, by the majority, in a collective body [such as a town meeting in which one could participate personally], or by fair representation.' " 4 Adams, *supra*, 401. "Legitimate government," he added, "consists only . . . of *equal laws* made with *common consent* . . . . " (emphasis in original) *Id*. 401, 403.

When the original text of the Constitution was ratified to "secure the Blessings of Liberty," the right of citizens to give or withhold consent to the enactment of statutes was incorporated in the Constitution's prescription for legislative action as part of the Founders' plan "to preserve freedom." *INS v. Chadha*, 462 U.S. 919, 959; *See* 951, 957 (1983); App. 62a-65a. As George Mason remarked during the Constitutional Convention, the House "was to be the grand depository of the democratic principle . . . . " 1 Farrand, *supra*, 48. It was to be "our House of Commons." *Id*. Accordingly, as Madison added, "[n]o law . . . [may] be passed without the concurrence . . . of a majority of the people," as expressed by at least a majority of the members present and voting in the House of Representatives. Cooke, *supra*, 417.

Madison equated "the blessing of liberty" with the fact "that the laws are [to be] made by men of their own choice." *Id*. 421. For Hamilton, the original text of the Constitution was a bill of rights in the tradition of the

English Constitution, which "declare[s] and specif[ies] the political privileges of the citizens *in the structure* and administration of the government . . . . " (emphasis added) *Id.* 581; *See* 576.

2. The Court below held that the Governor is entitled to absolute legislative immunity because he was "acting in a legislative capacity" when he exercised the veto power. App. 4a-5a. However, that determination ignores the standard that this Court has prescribed for determining when the immunity is applicable. It ignores the purpose of the immunity. And it repudiates the American "tradition of legislative freedom." *See Tenney v. Brandhove,* 341 U.S. 367, 376 (1951).

2.a. Courts must determine whether challenged conduct falls within the "sphere of *legitimate* legislative activity," as a *prerequisite* to a decision that a defendant is entitled to the immunity. (emphasis added) *Id.* at 376, 379; *Eastland v. U.S. Servicemen's Fund,* 421 U.S. 491, 501, 503-504 (1975). The opinion below is the first – by any court – to hold that the immunity shields the conduct of an *executive* who completely supersedes the result of a legislature's deliberative process – by composing and enacting statutes that are contrary to the manifest intent of the corresponding provisions in the text of an enrolled bill. Yet, the lower Court made no attempt to evaluate the challenged conduct in light of either the standard prescribed by this Court, or the policies that that standard was fashioned to serve.

2.b. The doctrine of legislative immunity was established " '*to support the rights of the people* [to representation in the legislative process] by enabling their representatives to execute the functions of their office . . . . ' " (emphasis added)

Tenney v. Brandhove, supra, 341 U.S. at 373-374 (citation omitted). It is founded on a recognition that " 'freedom of deliberation, speech, and debate . . . is . . . essential to the rights of the people . . . . ' " *Id.* at 373. Accordingly, the immunity is intended to preserve the "integrity of the legislative process" and the "independence of the legislature" by foreclosing "executive control of legislative speech or debate and . . . voting," and by shielding acts that are "clearly a part of . . . the *due* functioning of the [legislative] process." (emphasis in original) *United States v. Brewster,* 408 U.S. 501, 507-508, 516-(1972); *Gravel v. United States,* 408 U.S. 606, 620 (1972).

These policies are eviscerated when the Governor uses the veto as a means of composing a new statute. There is no notice to the public, no opportunity for hearing, and no fact-finding with respect to the impact of the new statute. In addition, "the step-by-step . . . deliberative process," which is part of the customary legislative process, both in Congress and in Wisconsin, is superseded. *See INS v. Chadha, supra,* 462 U.S. at 959. The Governor performs "the essentials of the legislative function" by determining both "the legislative policy and its . . . promulgation as a . . . binding rule of conduct." *See Yakus v. United States, supra* n. 3, 321 U.S. at 424. And the provisions that he composes are neither introduced for consideration in the form of amendments to a bill, nor considered in a committee, nor debated on the floor, nor voted upon in either House, prior to their enactment. As a result, creative use of the veto plainly "undermines the 'public good' by interfering with the rights of the people to representation in the democratic process." *Spallone v. United States,* ___ U.S. ___, 110 S.Ct. 625, 634 (1990) (citation omitted).

Most important, legislators are deprived of the traditional power of determining, by a majority of the votes they cast as the proxies of their constituents, whether they will withhold the consent of the people to a proposed enactment. As explained, this power is inherent in the Founders' concept of the liberty of the subject. Accordingly, the Governor's conduct cannot be held to be within "the sphere of legitimate legislative activity" without repudiating both the Founders' concept of liberty and the very "tradition of legislative freedom" that the immunity is intended to preserve.

2.c. The Court below assumes that every executive veto confers "*some* legislative power . . . [that] is greater or smaller depending on the precise scope of the veto . . . . " (emphasis in original) App. 12a. However, the Constitution expressly assigns "[a]ll legislative powers" to the Congress (Article I, §1), and the Wisconsin Constitution similarly grants "[t]he legislative power" to the Legislature (Article IV, §1). As James Wilson explained, the President is given a role in the legislative process, but "he possesses no legislative power." J. McMaster and F. Stone, eds., *Pennsylvania and the Federal Constitution*, 335 (1888) [hereinafter cited as McMaster]. It requires passage by a legislature to give a statute "any validity, or binding force." 1 Syrett, *supra*, 105. Accordingly, Wilson concludes, a proposal "becomes a law, not by his, but by the authority of the two houses of the legislature." McMaster, *supra*, 335.

These factors explain why the prevailing rule in every jurisdiction that has addressed the issue (except Wisconsin) is that:

> a partial veto must be so exercised that it eliminates or destroys the whole of an item or part and does not distort *the legislative intent* . . . by

> the careful striking of words, phrases, clauses or sentences. (emphasis added).

State ex rel. Sego v. Kirkpatrick, 86 N.M. 359, 365, 524 P.2d 975, 981 (1974); *See e.g. Welden v. Ray*, 229 N.W.2d 706, 710-713 (1975) (collecting cases); *Bengzon v. Secretary of Justice of the Philippine Islands*, 299 U.S. 410, 412-415 (1937); *Fitzsimmons v. Leon*, 141 F.2d 886, 888 (1st Cir. 1944). They also explain why the Founders conceived of the veto as a "negative" power, which merely permits an executive to return bills "for *re-consideration*" for the purpose of "*preventing* their becoming laws," subject "to being finally *rejected* only in the event of more than one third of . . . [the members in one] house concurring in the sufficiency of his *objections*." (emphasis added) Cooke, *supra*, 463, 494, 498.

In the American tradition of legislative freedom, an executive may serve as a check on the legislature. *Smiley v. Holm*, 285 U.S. 355, 368 (1932). But he is not "a constituent part of . . . " the legislature and, accordingly, legislation may be enacted without his " 'signature or assent.' " *Edwards v. United States*, 286 U.S. 482, 487 n.2, 490 (1932). Contrary to the decision below, he cannot possess any legislative power. *See Fitzsimmons v. Leon, supra*, 141 F.2d at 888; *Bethlehem Steel Corporation v. Gorsuch*, 742 F.2d 1028, 1036 (7th Cir. 1984) (Posner, J.); *Thirteenth Guam Legislature v. Bordallo*, 430 F.Supp. 405, 407-410 (D. Guam, 1977).

3. The Court below held that this action is barred by *Dreyer v. Illinois*, 187 U.S. 71, 83-84 (1902), and later cases that rely on *Dreyer*, because "the Constitution does not require a state to imitate the [national] separation of powers . . . . " App. 5a. However, the petitioners rely on the tradition of liberty that was a fundamental part of the

English Constitution – for centuries – before the concept of separation of powers was even articulated. That tradition, in contrast to the concept of separation of powers, does not foreclose concentration of the judicial and executive powers in the Legislature. In fact, legislative supremacy was characteristic of many of the early State governments. Thus, the petitioners did not contend below, and do not contend here, that Wisconsin is required "to allocate powers among the branches of state government in the same manner . . . [as] the federal government." *See* App. 5a.

Moreover, *Dreyer* and its progeny merely hold that the due process clause of the Fourteenth Amendment, *in and of itself*, does not require the States to adopt the federal separation of powers. As this Court reasoned in *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 639 (1943), "[t]he test of legislation which collides with the Fourteenth Amendment, because it also collides with the principles of the First, is much more definite than the test when only, the . . . [due process clause] is involved." When First Amendment rights are involved, and by extension, other liberty interests, the "specific prohibitions" that are inherent in the concept of liberty provide the standard for decision. *Id.*

Accordingly, the petitioners' claims cannot fairly be rejected without an analysis of the evidence they have presented to demonstrate that the concepts of liberty, republican government, and equal protection of the laws contain judicially enforceable "prohibitions" that forbid what the Governor has done. If his conduct is forbidden, any collateral impact of that determination on the balance of power between the Governor and the Legislature cannot immunize deprivations of constitutionally protected

rights from scrutiny under 42 U.S.C. §1983. *See Palko v. Connecticut*, 302 U.S. 319, 322, 324-325 (1937); *Dennis v. Higgins*, ___ U.S. ___, 111 S.Ct. 865, 868-869 (1991). As Justice White declared for this Court in *Hunter v. Erickson*, 393 U.S. 385, 392 (1969):

> [I]nsisting that a State may distribute legislative power as it desires . . . may generally be true, but these principles furnish no justification for a legislative structure which otherwise would violate the Fourteenth Amendment . . . . The sovereignty of the people is itself subject to those constitutional limitations which have been duly adopted and remain unrepealed.

4. The Fourteenth Amendment provides that no State shall "deprive any person of . . . liberty . . . without due process of law." App. 84a. In determining whether a particular right is entitled to the protection of the due process clause, the question is whether the asserted right is "so rooted in the traditions and conscience of our people as to be ranked as fundamental," *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934), or so embodies " 'those fundamental principles of liberty and justice which lie at the base of all our civil and political institutions' " that it is "implicit in the concept of ordered liberty." *Palko v. Connecticut, supra*, 302 U.S. at 324-325, 328 (1937). In this context, the decisions of this Court "reflect 'continual insistence upon respect for the teachings of history [and] solid recognition of the basic values that underlie our society . . . .' " *Michael H. v. Gerald D.*, 491 U.S. 110, 122-123 (1989) (Scalia, J., plurality opinion; citation omitted).

From the commencement of this action, the petitioners have asserted that they each have a personal liberty interest, which consists of the right of a qualified voter to give or withhold consent to the enactment of

statutes – by a majority of the votes cast by the legislators in a representative assembly – whenever there is no opportunity for the electors to participate personally in the act of giving or withholding such consent. The claim is supported by the affidavits of Dr. John P. Kaminski and Dr. Stanley I. Kutler, who are respected experts in the field of American constitutional history at the University of Wisconsin. *See* App. 37a-67a.[4]

Each affidavit is based on an examination of 131 pages of exhibits taken from authoritative commentaries and compilations of documents. *See* App. 41a-43a. In this context, Dr. Kaminski states his expert and uncontroverted opinion (App. 65a-66a) that the essence of the Founders' concept of liberty:

> was the *right of citizens:* (1) to participate in the consideration and enactment of legislation through their elected representatives in a branch of the legislature that was established to provide a representation of the people who comprised the electorate; and (2) to give or withhold their consent to the enactment of all legislation, by at least a majority vote of the members present and voting in that branch of the legislature. (emphasis added)

Inexplicably, the Court below mischaracterizes the petitioners' claim as an assertion that "the [governmental] power that a public official has by virtue of his office is a form of 'liberty.'" App. 11a. No such argument was ever presented. Moreover, despite the petitioners' attempts to focus attention on the *Snyder* and *Palko* standards at each stage of this litigation, and despite the

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[4] Because Dr. Kaminski and Dr. Kutler state the same conclusions, the affidavit of Dr. Kutler is omitted from the appendix herein.

uncontroverted evidence that they presented with respect to the Founders' understanding of the concept of liberty (*See* App. 39a-67a), neither of the lower courts engaged in any evaluation of the petitioners' evidence in the light of the standards that this Court has prescribed for establishing a substantive violation of the due process clause. *See* App. 10a-12a, 35a-37a.

5. The petitioners contend that the Guarantee Clause is the means that the Founders chose to prohibit the States from depriving their citizens of their rights to liberty and self-government. It resulted from Edmund Randolph's motion that " 'no State be at liberty to form any other than a Republican Govt.' " App. 75a. James Wilson then moved, and the Convention agreed, to substitute the Guarantee Clause " 'as a better expression' " of *that idea*. *Id*. Thus, the Guarantee Clause was designed to permit " 'the interposition of the general government' " to restore a republican prescription for governmental action that has been replaced with an "anti-republican" one. *See* App. 78a; 2 Farrand, *supra*, 48-49.[5]

The Guarantee Clause claim is supported by a separate affidavit that was executed by Dr. Kaminski (App. 68a-83a), and by part of the affidavit that was executed by Dr. Kutler. *See* n. 4, *supra*. After examining 41 pages of exhibits derived from authoritative sources (*See* App. 70a-71a), in addition to those examined with respect to

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[5] The petitioners contend that the Guarantee Clause is a substantive guarantee *to the people* of each State, and is therefore a source of personal rights. *See Texas v. White*, 74 U.S. 700, 720-721 (1869). In addition, they contend that the placement of the Guarantee in Article IV reflects an intent that it be enforced, where appropriate, by each branch of government.

the concept of liberty (*See* App. 72a, 80a), Dr. Kaminski states his uncontroverted opinion (App. 82a), that:

> a 'republican form of government' was originally understood as a written constitution which 'placed government in the people' by means of a prescription for legislative action that required the concurrence and consent of at least a majority of the members present and voting, in at least one branch of the legislature that was representative of the citizens.

5.a. The Court below held, in conflict with the reasoning of *Baker v. Carr, supra* n. 2, that the Guarantee Clause claim is not justiciable. App. 7a. *Baker* made clear that "it is the involvement in Guaranty Clause claims of the elements thought to define 'political questions,' *and no other feature*, which could render them nonjusticiable." (emphasis added) *Id.* at 229; *See* 217-218. Yet, the Court below did not find any of the elements that define a political question to be present.

Moreover, *Baker* explicitly states that "the judiciary might be able to decide the limits of the meaning of 'republican form . . . . '" *Id.* at 222-223, n. 48. There is "'unmistakable evidence of what was republican in form,'" *Baker* declares, in the characteristics of the state governments that existed when the Constitution was adopted. *Id.* (citation omitted). And that is precisely the kind of evidence that the petitioners submitted in support of their claim. App. 52a-67a; 78a-83a.

5.b. If the Court below was correct in believing that decisions of this Court still *require* all Guarantee Clause claims to be held nonjusticiable, that proposition is ripe for reexamination. First, state and federal courts have read *Baker* as a rejection of that view. *See e.g.* comment, "The Guarantee of Republican Government: Proposals for Judicial Review, 54 U. Chi. L. Rev. 208 (1987); D. Merritt,

"The Guarantee Clause and State Autonomy," 88 Columb. L. Rev. 1, 70-72 (1988); A. Kurland, "The Guarantee Clause as a Basis for Federal Prosecution of State and Local Officials," 62 S. Cal. L. Rev. 367, 454-457 (1989). Second, scholars and judges have powerfully criticized the view that all Guarantee Clause claims must be dismissed. *Id.*; App. 7a; R. Bork, *The Tempting of America* 86 (1990).

In addition, this case is of exceptional public importance. It is the first to allege violations of the principle that the people have a "right" to "pass [or reject] their own laws" – the very principle that this Court declared to be "fundamental" in *In re Duncan, supra,* 139 U.S. at 461-462. And, because that precise issue is one of first impression, a decision for the petitioners would not cast doubt on the result that was reached in any existing decision involving the Guarantee Clause.

5.c. The court below held, without any apparent evaluation of the petitioners' evidence, that history "is unclear" with respect to the meaning of the Guarantee Clause. App. 8a. It relies on John Adams' assertions that he did not understand either "the word republic," or the meaning of the Clause. *Id.* But Adams was the principal drafter of the Massachusetts Constitution. The Massachusetts Convention gave him the task of composing the constitution of "'a FREE REPUBLIC,'" with an explicit direction "'[t]hat it is the essence of a free republic, that the people be governed by FIXED LAWS OF THEIR OWN MAKING.'" (Capitals in original). 4 Adams, *supra,* 215-216. Accordingly, Adams composed a prescription for legislative action that requires each statute to have the consent of the people, as expressed by at least a majority

of the votes cast in the Massachusetts House of Representatives. App. 59a-60a.

The Court also relies on Madison's statement that a republic is merely "'a government which derives all its powers directly or indirectly . . .'" from the people. App. 8a; *See* Cooke, *supra*, 251. However, it was Madison who conceived the Guarantee as a means of preserving the "Republican Theory" that "Right and Power . . . [are] vested in the majority." App. 72a-73a. He advocated "election of one branch *at least* of the Legislature by the people immediately" as a "clear principle" that is "essential to every plan of free government." (emphasis added). 1 Farrand, *supra*, 134, 49. And, he emphasized that the House, like "*one branch at least* of all the State legislatures, is [to be] elected immediately by the great body of the people." (emphasis added). Cooke, *supra*, 252.

Thus, Madison's statement assumes compliance with the "clear principle" that popular or legislative consent to a statute is "essential to . . . free government." 1 Farrand, *supra*, 134, 49; *See* Cooke, *supra*, 417. As long as a faction consists of less than a majority, he declared, "'the republican principle'" permits "'the majority [of the representatives of the people] to defeat its sinister views by regular vote.'" App. 76a-77a.

6. The Equal Protection claim rests on the premise that it is an inherent function, of any legislature in a free society, to give or withhold consent to the enactment of statutes. *See e.g.* App. 44a-67a. Accordingly, when Wisconsin decided to establish *a legislature*, it necessarily gave each citizen "a constitutionally protected right to participate . . . [in the legislative decision to give or withhold consent to the enactment of statutes] on an

equal basis with other citizens. . . . " *See Dunn v. Blumstein*, 405 U.S. 330, 336 (1972); *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 34-35, nn. 78 and 74 (1973).

6.a. Wisconsin gives different treatment to statutes that are enacted in the customary manner and statutes that are composed and enacted by the Governor. As a result, when the veto is used to compose and enact statutes, the requirement of a two-thirds vote is applied to the right to give or withhold consent. In that context, the requirement has the effect of diluting the power of legislators to withhold the consent of the people, while it expands the power of legislators who support the Governor's enactments. And, since legislators represent voters who reside in identifiable legislative districts, each dilution of the power to withhold consent necessarily divides the citizens of the state into two classes, and deprives one of those classes of "substantially equal state legislative representation for all citizens, *of all places*. . . . " (emphasis added) *Reynolds v. Sims, supra* n. 2, 377 U.S. at 568.

As in *Baker v. Carr, supra* n. 2, 369 U.S. at 207, the disparity places a class consisting of all of the voters of some legislative districts "in a position of constitutionally unjustifiable inequality *vis-á-vis* [a class of] voters" who reside in other districts. The only difference is the fact that the disparities here are related to particular proposals for legislation.

6.b. The Court of Appeals holds that "[t]here is no inequality" because the creative veto merely "shift[s] power from . . . " one body to another. App. 10. That might be true if Wisconsin no longer had a legislature. But the members of the Legislature (and their constituents) still have a state-created right to withhold consent

to the Governor's enactments, *albeit* by a supermajority of two-thirds of the members in each chamber. And it is the requirement of a supermajority – for that purpose – which deprives citizens of substantially equal state legislative representation.

6.c. The Court below also declares that the equal protection claim "proves – contrary to *Gordon v. Lance*, 403 U.S. 1, 5-7 (1971) – that all supermajoritarian voting requirements . . . " are unconstitutional. App. 10a. But *Gordon* merely holds that "a simple majority vote . . . [may be declared] insufficient" *to enact* certain kinds of statutes. *Id.* 6; *See* 6-7. And, whether a statute is agreed to by a simple majority, or a supermajority, the resulting enactment still has the *consent* of *at least* a majority.

The lower Court overlooks the fact that the Founders "shared an understanding of majority rule according to which *certain* kinds of restraints on the popular will did not violate the basic principle itself." (emphasis in original). J. Bessette, "Deliberative Democracy: The Majority Principle in Republican Government," in R. Goldwin and W. Schambra, eds., *How Democratic Is the Constitution?* 29 (1980). That "understanding" permits the will of a majority of the House of Representatives to be denied by a failure of passage in the Senate or a presidential veto. *Id.* But it also recognizes that no statute may be enacted without the consent of *at least* a majority of the House. *See* App. 53a-65a.

7. The First Amendment claim also rests on the premise that Wisconsin's establishment of a legislature has given legislators [and their constituents] a "privilege of rejecting" legislation that is secured by the Constitution. However, the Court below ignores the premise that

it is an inherent function of a legislature to give or withhold the consent of the people. *See* App. 9a.

In this context, a number of Courts have held that the "act of voting on public issues" by legislators and other officials "comes within the freedom of speech guarantee of the first amendment." *Miller v. Town of Hull*, 878 F.2d 523, 532 (1st Cir. 1989); *Clarke v. United States*, 705 F.Supp. 605, 610 (D.D.C. 1988), *affirmed* 886 F.2d 404, 411-413 (D.C. Cir. 1989), *vacated as moot*, 915 F.2d 699 (1990); *Wrzeski v. City of Madison*, 558 F.Supp. 664, 667 (W.D. Wis. 1983); *See* also *Bond v. Floyd*, 385 U.S. 116, 135-137 (1966); *Hutchinson v. Proxmire*, 443 U.S. 111, 133 (1979). This form of speech " 'necessarily comprise[s] the decision of both what to say and what *not* to say.' " (emphasis in original) *Riley v. National Federation of the Blind*, 487 U.S. 781, 797 (1988); *See Wooley v. Maynard*, 430 U.S. 705, 714 (1977). Yet, the Affidavit of Senator Risser contains uncontroverted evidence (pp. 8-10) that he and other Senators were in fact deterred from attempting to vote to override (and thereby repeal) certain gubernatorial enactments, because the requirement of a supermajority – for that purpose – made the attempts an act of futility. And there is no apparent reason for the coercion of legislative acquiescence in the enactment of that legislation, other than the fact that it embodied the policies, preferences or whims of the executive.

Having established a *legislature* to perform the function of giving or withholding the consent of the citizens to the enactment of statutes, Wisconsin may not deprive some of an equal opportunity for use of that forum, merely because they wish to withhold the consent of the people to a particular enactment. *See Police Department of Chicago v. Mosley*, 408 U.S. 92, 94-96, 101-102 (1972). As

this Court has noted, a suppression of speech "'that is motivated by nothing more than a desire to curtail expression of a particular point of view on controversial issues of general interest is the purest example of a . . .'" rule that abridges the freedom of speech. *FCC v. League of Women Voters*, 468 U.S. 364, 383-384 (1984). (citation omitted) "[A]bove all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Police Department of Chicago v. Mosley, supra*, 408 U.S. at 95.

8. The Court of Appeals concluded that there is "no need to involve the federal courts in this affair" because there is a "political remedy" for the petitioners' grievance App. 12a-13a. But that determination ignores the teaching of this Court that "'liberty . . . and other fundamental rights may not be submitted to a vote; they depend on the outcome of no elections.'" *Lucas v. Colorado General Assembly*, 377 U.S. 713, 736-737 (1964). Thus, the presence or absence of a political remedy is not dispositive. *Id.* at 737; *Reynolds v. Sims, supra* n. 2, 377 U.S. at 553, n. 25.[6]

The very purpose of the Constitution "was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the Courts." *West Virginia State Board of Education v. Barnette, supra*, 319 U.S. at 638. The petitioners contend that one of those subjects is, in the words

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[6] The record reflects not only that a political remedy was sought, but that the effort has failed to preclude the enactment of statutes that do not have either popular or legislative consent. App. 2a, 85a.

of Justice Story, the "'fundamental principle of a free government, and especially of a republican government, that no laws ought to be passed without the cooperation *and consent* of the representatives of the people. . . .'" (emphasis added) App. 64a-65a.

CONCLUSION

For the reasons set forth above, the petitioners respectfully request that the Court grant the petition.

Respectfully submitted,

FREDERICK B. WADE
Counsel of Record

Suite 804
122 West Washington Avenue
Madison, WI 53703
608-255-5111

July 12, 1991

APPENDIX

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 90-3119
FRED A. RISSER AND DAVID M. TRAVIS,

Plaintiffs-Appellants,

v.

TOMMY G. THOMPSON,

Defendant-Appellee.

Appeal from the United States District Court
for the Western District of Wisconsin.
No. 90 C 215 – **John C. Shabaz,** *Judge.*

ARGUED FEBRUARY 14, 1991 – DECIDED APRIL 16, 1991

BEFORE WOOD, JR. and POSNER, *Circuit Judges,* and FAIRCHILD, *Senior Circuit Judge.*

POSNER, *Circuit Judge.* The constitution of the State of Wisconsin has since 1930 provided that "appropriation bills may be approved in whole or in part by the governor, and the part approved shall become law," Art. V, § 10(1)(b), unless the veto is overridden by a two-thirds vote in each house of the legislature; in that event the bill becomes law in the form in which the legislature had originally approved it. § 10(2)(b). Many states have partial-veto provisions of this general type (Chester James Antieau, *The Executive Veto* 36 (1988)); and under the name "line-item veto" the policy of these provisions has repeatedly been urged upon the Congress of the United States. What is unique about Wisconsin, however, is that the courts of that state have read the words "in part"

literally. By doing so they have empowered the governor not only to delete particular appropriations (line items), but also to delete phrases, words (such as "not") – even individual letters and digits – within an individual item or provision, and to do so even if the effect is to create a law remote from the legislators' intentions. *State ex rel. Wisconsin Telephone Co. v. Henry*, 218 Wis. 302, 260 N.W. 486 (1935); *State ex rel. Wisconsin Senate v. Thompson*, 144 Wis. 2d 429, 424 N.W.2d 385 (1988). Last year the Wisconsin constitution was amended to provide that "in approving an appropriation bill in part, the governor may not create a new word by rejecting individual letters." Art. V, § 10(c). But he remains free to delete phrases, words, and digits. Governor Thompson, a Republican, has used this power to modify numerous provisions in appropriations bills enacted by the legislature, both houses of which are controlled by the Democrats. Many of these provisions have nothing to do with appropriations. For often the legislature will attach substantive amendments to the omnibus appropriations bill that is the principal legislative initiative in each session, and the governor will use his power of partial veto to change the meaning of those provisions.

Two Democratic legislators sue the governor for a declaration that the partial veto provision of the Wisconsin constitution, as interpreted by the Wisconsin courts, violates the clauses of the federal Constitution that guarantee free speech, due process of law, equal protection of the laws, and a republican form of (state) government. The plaintiffs also seek an injunction against the governor's using the provision in the future and an order

nullifying past legislation created by the use of the provision. The district court dismissed the suit on the governor's motion for summary judgment.

We must first consider whether the plaintiffs have standing to maintain this suit. They argue that since the Democrats do not have two-thirds control of both houses of the Wisconsin legislature, the partial veto provision reduces the voting power of Democratic legislators such as themselves. *Coleman v. Miller*, 307 U.S. 433, 438 (1939), holds that state legislators do indeed have standing to challenge measures that diminish the effectiveness of their votes, by analogy to the right of a private citizen to maintain a tort suit for deprivation of his right to vote. *Ashby v. White*, 2 Ld. Raym. 938, 92 Eng. Rep. 126 (K.B. 1703); *Nixon v. Herndon*, 273 U.S. 536 (1927). The applicability of *Coleman* to congressional standing was, it is true, questioned in Judge (now Justice) Scalia's concurring opinion in *Moore v. U.S. House of Representatives*, 733 F.2d 946, 957-61 (D.C. Cir. 1984), and in Judge Bork's dissenting opinion in *Barnes v. Kline*, 759 F.2d 21, 50, 62-63 (D.C. Cir. 1985), vacated as moot under the name *Burke v. Barnes*, 479 U.S. 361 (1987), on the ground that judicial intervention in disputes between Congress and the President threatens to disrupt the separation of powers that the Constitution ordains. But neither judge questioned the continued vitality of the *Coleman* decision within its original domain, that of suits by *state* legislators. We shall see that the federal Constitution does not prescribe any particular separation of powers within state government, so that the concerns expressed by Judges Bork and Scalia cannot arise in a case in which a state legislator sues the state's executive or judiciary. Yet there is much in these

opinions that strikes at the heart of *Coleman* – such as Judge Scalia's distinction between the rights of an individual (for example, his right to vote) and "the powers of an office," which "belong to the people and not" to the office holder. 733 F.2d at 959. See also *Thornton v. Barnes*, 890 F.2d 1380, 1392 (7th Cir. 1989) (concurring opinion). Ordinarily, a person lacks standing to complain about the deprivation of something in which he has no legally protected interest.

However all this may be, no court has yet concluded that *Coleman* should be regarded as defunct, *Chiles v. Thornburgh*, 865 F.2d 1197, 1205 (11th Cir. 1989), and we are naturally timid about overruling decisions of the Supreme Court. *Olson v. Paine, Webber, Jackson & Curtis, Inc.*, 806 F.2d 731 (7th Cir. 1986); C. Steven Bradford, "Following Dead Precedent: The Supreme Court's Ill-Advised Rejection of Anticipatory Overruling," 59 *Fordham L. Rev.* 39 (1990). It will not pay, though, to pursue the question further in this case, which was in any event rightly dismissed. To begin with, the suit is against the wrong defendant. Legislators' immunity is absolute, *Tenney v. Brandhove*, 341 U.S. 367 (1951), and extends to injunctive as well as to damages suits. *Supreme Court v. Consumers Union*, 446 U.S. 719, 732-33 (1980). When the governor of a state is exercising his veto power, he is acting in a legislative capacity, *Edwards v. United States*, 286 U.S. 482, 490-91 (1932); *State ex rel. Wisconsin Senate v. Thompson, supra*, 144 Wis. 2d at 454-55, 424 N.W.2d at 395; *Rateree v. Rockett*, 852 F.2d 946, 951 (7th Cir. 1988) (dictum), and he is therefore entitled to absolute immunity. Cf. *Hernandez v. City of Lafayette*, 643 F.2d 1188, 1193 (5th Cir. 1981). The proper defendants in this suit would be

officials or others enforcing or relying upon the laws created in the manner that the plaintiffs claim is unconstitutional. But it would be pointless for us to affirm the dismissal of the suit on the basis of the governor's immunity. That would just lead to the suit's being refiled against the proper defendants. We are persuaded that the suit has no possible merit, and we therefore do not wish to make the parties jump through another hoop. Since immunity even when absolute is a defense to a suit rather than a denial of the court's jurisdiction, we are not obliged to stop with a ruling that the defense is available in this suit.

A number of provisions of the federal Constitution assume that states have branches much like those of the federal government. Art. I, § 2 (cls. 1, 4), § 3 (cl. 1 – since superseded by the Seventeenth Amendment), § 4 (cl. 1); Art. II, § 1 (cl. 2); Art. IV, § 3 (cl.1), § 4; Arts. V and VI (cl. 3); Amend. XIV, §§ 2, 3; Amend. XVII. Some provisions even assign specific duties to specific branches of state government. For example, Art. I, § 4, cl. 1 provides that each state legislature shall prescribe the time, place, and manner of electing the state's U.S. Senators and Representatives. But in a series of decisions on which the plaintiffs do not deign to comment, we have held that the Constitution does not require a state to imitate the separation of powers prescribed for the federal government by the Constitution. It therefore does not require a state to allocate powers among the branches of state government in the same manner in which the Constitution prescribes that allocation among the branches of the federal government. *Chicago Observer, Inc. v. City of Chicago*, No. 90-3552, slip op. at 5-6 (7th Cir. April 5, 1991); *United*

Beverage Co. v. Indiana Alcoholic Beverage Comm'n, 760 F.2d 155, 158 (7th Cir. 1985); *Alleghany Corp. v. Haase*, 896 F.2d 1046, 1053 (7th Cir. 1990), vacated as moot under the name *Dillon v. Alleghany Corp.*, 59 U.S.L.W. 3652 (March 25, 1991); *Falls v. Town of Dyer*, 875 F.2d 146 (7th Cir. 1989); *Coniston Corp. v. Village of Hoffman Estates*, 844 F.2d 461, 469 (7th Cir. 1988); *Ware v. Gagnon*, 659 F.2d 809, 812 (7th Cir. 1981).

These decisions, well grounded as they are in decisions by the Supreme Court, *Dreyer v. Illinois*, 187 U.S. 71, 83-84 (1902); *Prentis v. Atlantic Coast Line Co.*, 211 U.S. 210, 225 (1908); *Mayor v. Educational Equality League*, 415 U.S. 605, 615 and n. 13 (1974); *Whalen v. United States*, 445 U.S. 684, 689 n. 4 (1980), put these plaintiffs out of court. The effect of the partial veto provision in the Wisconsin constitution, as the provision has been interpreted, is to give the governor greater power over the appropriations process than he would have if he had a simple veto power or even a line-item veto power, that is, a power to veto particular appropriations without having to veto the entire omnibus appropriations bill and thereby bring state government to a grinding halt. It is true that the present governor frequently exercises his partial veto power on nonappropriations items. But that is because the legislature chooses – for reasons unilluminated by the record of this case, but no doubt founded on considerations of legislative gamesmanship rather than on some edifying concept of the public interest – to attach substantive provisions as riders to the omnibus appropriations bill. If the legislature stops doing this, the governor's "creative" veto power will be limited to appropriations matters.

It is not even certain that the partial veto power makes the governor of Wisconsin more powerful than the governors of other states. The litigants have not informed us about any aspect of the separation of powers in Wisconsin or any other state other than the partial veto power itself. Maybe when all the checks and balances in Wisconsin's government are taken into account, the state's governor is weaker than the governor of some or even many other states. But if he is stronger, still it does not follow that Wisconsin is violating the Constitution of the United States. The Constitution does not prescribe the balance of power among the branches of state government.

This conclusion is not altered by considering the specific constitutional provisions invoked by the plaintiffs. The clause guaranteeing to each state a republican form of government has been held not to be justiciable, *Pacific States Tel. & Tel. Co. v. Oregon*, 223 U.S. 118, 148-51 (1912); *Baker v. Carr*, 369 U.S. 186, 218-26 (1962); *Highland Farms Dairy, Inc. v. Agnew*, 300 U.S. 608, 612 (1937); *United Beverage Co. v. Indiana Alcoholic Beverage Comm'n, supra*, 760 F.2d at 158, and although this result has been powerfully criticized, for example in John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* 118 n.* (1980), it is too well entrenched to be overturned at our level of the judiciary. Even if the clause were justiciable, these plaintiffs would lose. A government is not monarchical or aristocratic merely because its chief executive is empowered to cross out words in an appropriations bill. In analogizing the governor of Wisconsin to the kings of England, and the legislature of Wisconsin to the Parliaments that struggled against royal prerogative in the

eighteenth century, the plaintiffs merely give analogy a bad name. Maybe, though, "republican form of government" signifies more than the absence of a monarch or an aristocracy vested with powers of government. On this the historical record is unclear. John Adams said late in life that "the word *republic* as it is used, may signify anything, everything, or nothing," insisted that he "never understood" what the guarantee of republican government meant, and added: "I believe no man ever did or ever will" (quoted in William Wiecek, *The Guarantee Clause of the U.S. Constitution* 13 (1972)). But James Madison, in *The Federalist No.* 39, had defined "republic" as "a government which derives all its powers directly or indirectly from the great body of the people, and is administered by persons holding their office during pleasure, for a limited period, or during good behavior." Suppose that Madison's understanding of the clause was right, and Adams's skepticism undue. It would make no difference in this case, even if the guarantee clause created rights upon which a lawsuit could be based. Not only is Wisconsin's governor not a hereditary prince; neither is he a dictator. He is an elected official, just as the plaintiffs are. Madison's interpretation was a flexible one; in *The Federalist No.* 43 he said that the states could "choose to substitute other republican forms" for those existing when the Constitution was enacted, "the only restriction" being "that they shall not exchange republican for antirepublican Constitutions." Wisconsin has not done that. A modest shift of power among elected officials is not a denial of republican government or even a reduction in the amount of democracy.

The plaintiffs' First Amendment claim is based on the idea that the people of Wisconsin can be said to speak, in a sense, through their legislators; and the effectiveness of their speech – not to mention the plaintiffs', the legislators', own speech – is reduced if the legislature must muster a two-thirds vote to prevent the governor from using his partial veto to create what is often, in effect, a new enactment. But the people "speak" through their governor in the same sense and to the same extent as they do through their legislators. If the legislators' freedom of speech is somehow impaired when their legislative power is diminished, then there must be an equal and offsetting increase in the governor's freedom of speech when his legislative power, exercised through the veto, is enlarged.

And all this assumes that freedom of speech is enlarged or contracted by rules allocating voting power. The assumption equates voting to speech; yet "the right to vote, per se, is not a constitutionally protected right," *Rivera-Rodriguez v. Popular Democratic Party*, 457 U.S. 1, 9 (1982), and the right to speak is. Of course, in a practical sense the power of one's speech can indeed be augmented or diminished by voting power. But it can also be augmented or diminished by money. There is something amiss in a mode of constitutional argumentation that derives a right to a redistribution of income and wealth from the free-speech clause. Cf. *Parker v. Merlino*, 646 F.2d 848, 855-56 (3d Cir. 1981); *Davids v. Akers*, 549 F.2d 120, 123-24 (9th Cir. 1977). It is another example of analogy gone wild.

The plaintiffs' equal protection argument is based on an analogy to the reapportionment cases, such as *Baker v.*

Carr, supra, and *Reynolds v. Sims,* 377 U.S. 533 (1964). The partial veto when exercised in a "creative" fashion is said to dilute the voting power of the plaintiffs' and other legislators' electors. This argument proves too much. It proves, what no one believes, that *all* gubernatorial vetoes, not just partial ones, violate the equal protection clause. It proves – contrary to *Gordon v. Lance,* 403 U.S. 1, 5-7 (1971) – that all supermajoritarian voting requirements (which is what a veto is) violate the clause. The reapportionment cases require that each elector have the same voting power, as measured by the number of votes required to elect each elected state official. Maybe – though this we certainly need not decide – those cases could be extended to require that each elected *representative,* as distinct from each *voter* for a representative, have one vote in the representative's house of the legislature, lest the apportionment of the legislature be set at naught by a maldistribution of voting power within the legislature. Cf. *Board of Estimate v. Mooris,* 489 U.S. 688, 698 (1989). But what the cases clearly do not speak to is the issue of the allocation of power between two branches of government both of which are elected. All that the creative veto power does is shift power from one properly apportioned elected body, the legislature, to another, the governor. There is no inequality. On the contrary, the governor is the only perfectly apportioned official in a state, since no two legislative districts have exactly the same number of voters.

But the plaintiffs' own liberty, they argue, is impaired by the partial veto, which prevents them from reaping the fruits of their membership in the majority bloc and does this for no good reason. In so arguing they appeal to the

concept of substantive due process. They argue that the power that a public official has by virtue of his office is a form of "liberty" within the meaning of the due process clause, so that to curtail the official's power is to curtail his liberty. This we greatly doubt; it is an inversion of the constitutional policy of protecting the citizen from government to treat the governmental power of an official as an aspect of his personal liberty that the courts are bound to protect. And for reasons explained in *Schroeder v. City of Chicago*, No. 90-1144, slip op. at 7-8 (7th Cir. March 13, 1991), we believe that to use the clause to complain of substantive rather than procedural deprivations, a plaintiff must be able to point to a right that is enumerated in the Constitution or at least suggested by one or more of the enumerated rights.

But if, despite what we have just said, the curtailment of a legislator's influence can, if arbitrary in the sense of irrational, vicious, or wholly unjustifiable, be deemed a denial of due process, the plaintiffs still must lose. Wisconsin's partial veto provision is not arbitrary in that sense. It enables the governor to strike appropriations items, to reduce appropriations by striking digits, and to cripple substantive items attached to appropriations bills by striking words and phrases. It thus empowers him to confine appropriations bills to appropriations matters, to exercise a line item veto as conventionally understood, and to reduce appropriations. So far – surely – so good. When, however, he uses the partial veto power to create a law that the legislature did not consider, let alone enact, then, we grant, he goes beyond the veto power as conventionally understood. But from a practical standpoint all that is involved is the governor's

having been given a limited legislative power subject to veto by the legislature – a power exercisable only so long as the legislature insists on attaching substantive riders to appropriation bills. That governors have *some* legislative power is the premise of any gubernatorial veto power. Their legislative power is greater or smaller depending on the precise scope of the veto power. Wisconsin's partial veto provision as interpreted by the state's highest court is a rational measure for altering the balance of power between the branches. That it is unusual, even quirky, does not make it unconstitutional. It violates no federal constitutional provision because the federal Constitution does not fix the balance of power between branches of state government. Far from providing that no part of the legislative power of the state shall be assigned to executive or judicial officials, the Constitution assigns some federal legislative power to the federal executive, through its veto provision. Wisconsin has decided to proceed further down this road. At the end of that road lies rule by executive decree, with no legislature at all. Such rule might place unbearable strain on the concept of republican government, at least as it was understood by Madison – though with what significance for *justiciable* rights would remain profoundly uncertain (for remember that the guarantee clause has been held to be nonjusticiable). But all this is academic, for what is at issue in this case is a retail, not a wholesale, reallocation of legislative power from the legislative to the executive branch.

Not only is there no federal judicial remedy for the plaintiff's grievance; there is a political remedy: amend the Wisconsin constitution. All that is required is that the

legislature in two sessions (with a general election intervening) pass an amendatory provision by a simple majority and submit it to the voters of the state for ratification, also by a simple majority. Wis. Const. Art. XII, § 1. If the plaintiffs can muster the votes to push the bill through the legislature, it will then be up to the people. If the people want to reduce the governor's power vis-à-vis the legislature's they will ratify the proposed amendment, just as they ratified only a year ago the amendment that ended his power to create new words by deleting individual letters. There is no need to involve the federal courts in this affair and no legal basis for doing so.

AFFIRMED.

A true Copy:
Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

UNITED STATES COURT OF APPEALS

For the Seventh Circuit
Chicago, Illinois 60604

JUDGMENT - WITH ORAL ARGUMENT

Date: April 16, 1991

BEFORE:

Honorable Harlington Wood, Jr., Circuit Judge

Honorable Richard A. Posner, Circuit Judge

Honorable Thomas E. Fairchild, Senior Circuit Judge

No. 90-3119

SENATOR FRED A. RISSER and REPRESENTATIVE DAVID M. TRAVIS,
Plaintiffs - Appellants

v.

TOMMY G. THOMPSON, Governor of the State of WISCONSIN,
Defendant - Appellee

Appeal from the United States District Court for the Western District of Wisconsin
No. 90 C 215, Judge John C. Shabaz

This cause was heard on the record from the above mentioned district court, and was argued by counsel.

On consideration whereof, **IT IS ORDERED AND ADJUDGED** by this Court that the judgment of the District Court in this cause appealed from be, and the same is hereby, AFFIRMED, with costs, in accordance with the opinion of this Court filed this date.

UNITED STATES COURT OF APPEALS

For the Seventh Circuit

Chicago, Illinois 60604

May 17, 1991

Before

Hon. Harlington Wood, Jr., Circuit Judge

Hon. Richard A. Posner, Circuit Judge

Hon. Thomas E. Fairchild, Senior Circuit Judge

FRED A. RISSER and DAVID M. TRAVIS, *Plaintiffs-Appellants,*	)	Appeal from the United States District Court for the Western District of Wisconsin.
No. 90-3119 v.	)	
TOMMY G. THOMPSON, *Defendant-Appellee.*	)	No. 90 C 215 John C. Shabaz, *Judge.*

ORDER

On May 3, 1991, plaintiffs-appellants filed a petition for rehearing with suggestion for rehearing en banc. All of the judges on the original panel have voted to deny the petition, and none of the active judges has requested a vote on the suggestion for rehearing en banc. The petition is therefore DENIED.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

SENATOR FRED A RISSER and REPRESENTATIVE DAVID M. TRAVIS,

Plaintiffs,

v.

TOMMY G. THOMPSON, Governor of the State of Wisconsin,

Defendant.

MEMORANDUM AND ORDER

90-C-215-S

Plaintiffs Senator Fred A. Risser and Representative David M. Travis move for partial summary judgment pursuant to Rule 56, Federal Rules of Civil Procedure, and defendant Tommy G. Thompson, Governor of the State of Wisconsin, moves for summary judgment in the above entitled action. This Court has jurisdiction based upon 28 U.S.C. § 1331 and 28 U.S.C. § 2201. Plaintiffs' motion for partial summary judgment is denied. Defendant's motion for summary judgment is granted.

FACTS

For purposes of this motion there are no material facts in dispute.

Plaintiff Fred A. Risser is a member of the Wisconsin Senate. He is president of the Senate, a member of the

Senate Democratic Caucus and is a member of the Democratic Party of Wisconsin. Plaintiff David M. Travis is a member of the Wisconsin State Assembly, the Assembly Democratic Caucus and is a member of the Democratic Party of Wisconsin. Plaintiffs are residents and taxpayers of the State of Wisconsin. Defendant Tommy G. Thompson is the Governor of the State of Wisconsin.

Appropriation bills, specifically 1987 Senate Bill 100, 1989 Senate bill 31, 1989 Senate Bill 365, 1989 Assembly Bill 353 and 1989 October Special Session Assembly Bill 12, were subject to the Governor's partial veto. The Governor exercised his partial veto over each of these appropriation bills. Authority for the Governor's exercise of the partial veto is found in Article V, § 10 of the Wisconsin Constitution. Article V, § 10 provides:

> **§ 10. Governor to approve or veto bills; proceedings on veto**
>
> Section 10. Every bill which shall have passed the legislature shall before it becomes a law, be presented to the governor; if he approve, he shall sign it, but if not, he shall return it, with his objections, to that house in which it shall have originated, who shall enter the objections at large upon the journal and proceed to reconsider it. Appropriation bills may be approved in whole or in part by the governor, and the part approved shall become law, and the part objected to shall be returned in the same manner as provided for other bills. If, after such reconsideration, two-thirds of the members present shall agree to pass the bill, or the part of the bill objected to, it shall be sent, together with the objections, to the other house, by which it shall likewise be reconsidered, and if approved by two-thirds of the members present it shall

> become a law. But in all such cases the votes of both houses shall be determined by yeas and nays, and the names of the members voting for or against the bill or the part of the bill objected to, shall be entered on the journal of each house respectively. If any bill shall not be returned by the governor within six days (Sundays excepted) after it shall have been presented to him, the same shall be a law unless the legislature shall, by their adjournment, prevent its return, in which case it shall not be a law.

The people of Wisconsin ratified a constitutional amendment to the Governor's partial veto authority on April 3, 1990. The constitutional amendment diminished the Governor's partial veto authority by prohibiting the creation of a new word by the rejection of individual letters in the words of an appropriation bill. The amendment did not inhibit the Governor's veto in any other respect.

Plaintiffs assert that the Governor's exercise of the partial veto violates certain rights secured by the United States Constitution and 42 U.S.C. § 1983. Specifically, the First and Fourteenth Amendments of the United States Constitution as well as the Guarantee Clause of the United States Constitution. Plaintiffs seek declaratory and injunctive relief and request retroactive nullification of those laws enacted pursuant to the "creative" use of the partial veto.

INTRODUCTION

The sole issue to be resolved by this Court is whether Article V, § 10 of the Wisconsin Constitution, the authority for the Governor's partial veto, violates the First or

Fourteenth Amendments of the United States Constitution or the Guarantee Clause of the United States Constitution. The federal constitutionality of Article V, § 10 has never been addressed. However, the Wisconsin Supreme Court in *Wisconsin Senate v. Thompson*, 144 Wis. 2d 429, 424 N.W.2d 385 (1988) discussed the intent of the Wisconsin electorate in adopting the partial veto amendment. In addition, the Court set forth the meaning and purpose of Article V, § 10 and explained the propriety of the "creative" use of the partial veto. First, the *partial* veto was designed to give the governor "a uniquely broad and expansive power to veto *parts* of an appropriation bill. This partial veto authority is broader than the item veto authority granted governors in other states and was adopted in this state to give the Governor flexibility to deal with omnibus appropriation bills." *Id.* at 450. Second, the "creative" use of the partial veto, also referred to as the affirmative use of the partial veto, is appropriate as long "as the parts remaining after the veto are a complete and workable law." *Id.* at 453. Finally, in addition to the "complete and workable law" requirement the Wisconsin Supreme Court recognized a "germaneness" limitation on the governor's partial veto authority. Namely, that the subject matter of the resulting provisions arising after the governor's use of his partial veto must be related or germane to the prior proposals submitted to him by the legislature. *Id.* at 452.

MEMORANDUM

Summary judgment shall be granted if there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. Rule 56, Federal

Rules of Civil Procedure. Pursuant to Rule 56 the moving party "bears the initial responsibility of informing the district court of the basis for its motion and identifying those portions of 'the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any,' which it believes demonstrates the absence of a genuine issue of material fact." *Celotex v. Catrett*, 477 U.S. 317, 323 (1986). "[A]t the summary judgment stage the judge's function is not himself to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986). Subsequently, the court should review the entire record with all reasonable inferences drawn from it taken in a light most favorable to the nonmoving party. *Reardon v. Wroan*, 811 F.2d 1025, 1027 (7th Cir. 1987).

Here, there are no material facts in dispute. Accordingly, the Court need only apply the appropriate law to the undisputed facts in order to resolve the issue of the constitutionality of Article V, § 10. Prior to addressing the substantive claims that Article V, § 10 of the Wisconsin Constitution violates various provisions of the federal constitution, the Court is compelled to address the multitude of defenses which the defendant has raised. The Court finds many of the defendant's arguments concerning these defenses quite persuasive. However, the Court believes that the merits of this action must be examined and that this examination is in the best interest of the people of the State of Wisconsin. Furthermore, although the Court finds that some of the defenses restrict the scope of this Court's authority, not one of the defenses completely precludes the Court from reaching the merits.

Eleventh Amendment

The principles surrounding the application of the Eleventh Amendment have been established by the Supreme Court in *Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 89 (1983) and *Green v. Mansour*, 474 U.S. 64 (1985). First, "[t]he Eleventh Amendment bars a suit against state officials when 'the state is the real, substantial party in interest.' " *Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 89 (1983) citing *Ford Motor Co. v. Department of Treasury of Indiana*, 323 U.S. 459, 464 (1945). Second, "[t]he Court has recognized an important exception to this general rule: a suit challenging the constitutionality of a state official's action is not one against the State." *Id.* at 102 and *Ex Parte Young*, 209 U.S. 123 (1908). Third, the exception in *Young* does not extend to claims for retroactive relief. *Green v. Mansour*, 474 U.S. 64 (1985). *See also, Ray v. Atlantic Richfield Co.*, 435 U.S. 151 (1978) [Injunctive relief proper to preclude enforcement of unconstitutional state laws].

Defendant asserts that because the state is the real party in interest in this matter, the Eleventh Amendment bars suit against it and the exception set forth in *Ex Parte Young*, 209 U.S. 123 (1908) does not apply. This action is to determine whether the actions of a state official taken pursuant to a provision of the Wisconsin Constitution violate portions of the Untied States Constitution. The *Ex Parte Young* exception explicitly allows a federal court to consider the constitutionality of a state law and if necessary render the appropriate declaratory and injunctive relief. Accordingly, this Court may examine the pertinent provision of the Wisconsin Constitution and the constitutional claims arising therefrom without violating the

Eleventh Amendment. However, the Court is limited in the type of relief that it may grant in that retroactive relief is not available. Thus, the Court may not nullify the laws which have previously been enacted as part of the Governor's partial veto.

Immunity

The defendant asserts that as Governor he is immune from suit in accordance with the legislative immunity doctrine espoused in *Tenney v. Brandhove,* 31 U.S. 367 (1951). The *Tenney* court held that a person's legitimate legislative actions were immune from suit under 42 U.S.C. § 1983. Courts when applying the *Tenney* holding have held that a state official who exercises his or her veto power is immune from suits arising from the exercise of that authority. *See Hernandez v. City of Lafayette,* 643 F.2d 1188 (5th Cir. 1981). Here, defendant asserts that the suit against him arises solely from the fact that he has exercised the gubernatorial partial veto power – a semi-legislative function. While the Court agrees that the *Governor's* exercise of *his* veto is being challenged, the core of the challenge is the *federal constitutionality of the authority* pursuant to which the Governor acts. The Court is hard-pressed to believe that an attack on the constitutional provision which authorizes a semi-legislative activity cannot be pursued because the Governor is immune from suits that involve the exercise of this function. Accordingly, the Court finds that the doctrine of legislative immunity is inapplicable to the facts of this case.

Laches and Res Judicata

The doctrine of res judicata "makes a final adjudication on the merits in a prior action conclusive in a subsequent action between the same parties, or their privies, as to all matters that were litigated or that might have been litigated." *Desotelle v. Continental Cas. Co.*, 136 Wis. 2d 13, 21, 400 N.W.2d 519 (Ct. App. 1986) citing *Landess v. Schmidt*, 115 Wis. 2d 186, 190-91, 340 N.W.2d 213 (Ct. App. 1983). "The doctrines of res judicata and collateral estoppel are founded upon principles of fundamental fairness . . . . These doctrines, however, may never be applied in such a fashion as to deprive a party of the opportunity to have a full and fair determination of an issue." *Id.* at 21-22.

The Supreme Court's decision in *Wisconsin Senate*, 144 Wis. 2d at 434 resolved the issue of "whether the governor's vetoes were invalid because the governor has no authority under Article V, § 10 of the Wisconsin Constitution to veto individual letters, digits or words and has no authority to reduce the appropriation amounts." The Court did not address any other issues. The action arose in the context of an action for declaratory and injunctive relief. *Id.* at 432. This Court recognizes the exception to the general res judicata rule which holds that judgment in a claim for declaratory relief is only binding as to those issues actually litigated and decided and is not binding upon those issues which might have been litigated. *Vandenplas v. City of Muskego*, 753 F.2d 555, 560 (7th Cir. 1985) and *Barbian v. Lindner Bros. Trucking Co.*, 106 Wis. 2d 291, 316 N.W.2d 371 (1982). Therefore, the fact that the federal constitutional claims were not raised in the state court declaratory judgment action does not bar

the resolution of the claims at this juncture. Furthermore, the Court is not convinced that raising the federal constitutional claims would have been previously appropriate as the state court was determining the scope of the state constitutional provision. Until the scope of the state provision was defined, the issue of whether it violated the federal constitution was premature. Regardless, the Court renders the doctrine of res judicata inapplicable and in the interest of fundamental fairness to the plaintiffs and the citizens of Wisconsin it should not be used to bar a determination of the merits of the claims now before this Court.

The doctrine of laches is an equitable defense that may be pursued in actions at law. *Anderson v. Kojo*, 110 Wis. 2d 22, 26, 327 N.W.2d 125 (Ct. App. 1982). To raise this defense, three elements must be proven: "(1) unreasonable delay; (2) lack of knowledge on the part of the party asserting the defense that the other party would assert the right on which he/she bases the suit, and (3) prejudice to the party asserting the defense in the event the action is maintained." *Id.* at 27. After review of the briefs filed in this matter there is absolutely no indication that the action was commenced after an unreasonable delay. Nor is there any indication that the parties lacked knowledge concerning constitutional claims. The authority present in the Wisconsin Constitution for the governors' veto has had a history of long debate and dissent. The fact that this authority would be challenged on a federal level is not outside the knowledge of the defendant. Finally, there is not a shred of evidence which indicates that defendant will experience prejudice. The defendant asserts that a "wholesale disruption of the

Wisconsin government" would occur if the laws were undone. See Defendant's Brief in Support of Motion for Summary Judgment at Page 24. However, the court is of the opinion that more disruption would ensue if the constitutional issues are not resolved at this time. In addition, consistent with the Eleventh Amendment and *Ex Parte Young* doctrine, the Court may not nullify laws that the Governor has already enacted via his partial veto. Accordingly, the "laws will not be undone and wholesale disruption of the Wisconsin government" will not occur.

Standing and Justiciability

Defendant adequately provides the Court with the appropriate law on justiciability and is correct in his conclusion that political questions are generally not appropriate for judicial resolution. However, the key is not whether the controversy involves a political question, but whether the subject matter is appropriate for judicial consideration. R. Rotunda, J. Nowak, J. Young, *Treatise on Constitutional Law Substance and Procedure*, §2.16, at 181 (1986). As the Wisconsin Supreme Court recognized in *Wisconsin Senate*, it is important to look beyond the fact that the issue involves a political question and examine the context of the entire matter to determine if judicial review is appropriate:

> Since *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), it has been recognized that it is peculiarly the province of the judiciary to interpret the constitution and say what the law is. We deem it to be this court's duty to resolve disputes regarding the constitutional functions of different branches of state government; we may

> not avoid this duty simply because one or both parties are coordinate branches of government. *See Barnes v. Kline*, 759 F.2d 21 (D.C. Cir. 1984). It is the responsibility of the judiciary to act, notwithstanding the fact that the case involves political considerations or that final judgment may have practical political consequences.

Accordingly, in light of the importance of examining the constitutional questions at issue and the fact that the judiciary is the best body to resolve issues of constitutional interpretation, the justiciability defense will not preclude a determination of this action.

Standing of the plaintiffs is speculative at best. However, as this court has opined throughout this memorandum, the merits of this action are significant and should be resolved. Accordingly, the court finds persuasive the reasoning in *Kennedy v. Sampson*, 511 F.2d 430 (D.C. Cir. 1974) and *Barnes v. Kline*, 759 F.2d 21 (1985) which allowed legislators to bring suit to "challenge injury to their participation in the lawmaking process". *Id.* at 26. Thus, the Court will not preclude these plaintiffs from proceeding on the basis of standing and will view the plaintiffs' challenge as one of protecting their participation in the lawmaking process.

CONSTITUTIONAL CLAIMS

Prior to addressing the substance of the constitutional claims it is important to note that the use of the Governor's partial veto authorized by Article V, §10 extends only to appropriation bills.

FIRST AMENDMENT

The First Amendment to the United States Constitution provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

The Court is convinced that a First Amendment analysis is not the appropriate standard by which to review the constitutional provision at issue. First Amendment review is not relevant when the government is not regulating speech nor an incidental, nonexpressive effect of speech. "Any other conclusion would lead to the absurd result that any government action that had some conceivable speech-inhibiting consequences, such as the arrest of a newscaster for a traffic violation, would require analysis under the First Amendment." *Arcara v. Cloud Books, Inc.*, 106 S. Ct. 3172, 3178 (1986) – (O'Connor, J. concurring). Here, the government action is in the form of a constitutional provision which allows a state governor to use partial veto authority when scrutinizing omnibus appropriation bills. This is not an amendment that seeks to regulate speech, nor is it in this Court's opinion an incidental nonexpressive effect of speech. Therefore, while having a conceivable speech inhibiting consequence, the fact that a legislator may believe that his or her speech has been inhibited because he or she was not able to override a Governor's veto, is not a violation of the First Amendment.

To allow a First Amendment claim under these circumstances would allow any member of the legislature or public to claim that his or her freedom of speech has been infringed because he or she is not in agreement with a particular law or vote (and was unable to persuade others of his or her position). A similar First Amendment argument was advanced in *Davids v. Akers*, 549 F.2d 120 (9th Cir. 1977). In *Davids*, state legislators claimed that their First Amendment rights were infringed because members of their political party were not appointed to standing committees in proportion to their membership in the House. The *Davids* court rejected the argument and stated:

> It stretches the language of the First Amendment beyond recognition to make it mean that an elected member of the state legislature, who so far as appears, has the usual right of a member to speak to and vote upon matters that come before the House, including the right to appear and testify before its standing committees, has had his right to assemble and petition the government infringed because the Speaker of the House has not appointed him or some of his colleagues to a committee or to certain committees. The way for him to get on committees of the House is to try to persuade the Speaker to change his practice, or to persuade the House to change the rules, or failing that (plaintiffs did try, and failed) to get together with fellow Democrats and persuade the voters to elect a Democratic majority in the next House. *Running to a Federal Judge for an injunction or a declaratory judgment requiring the speaker to put the plaintiffs or his colleagues on committees is a perversion of the judicial process into a political process.*

Id. at 124. Similarly, the plaintiffs in this matter can use their persuasive talents to convince their colleagues that a

particular exercise of the Governor's partial veto is inappropriate. In addition, the plaintiffs can fully participate in the creation of the bill that is sent to the Governor in the first instance and can effectuate a change in the Governors' power as was previously done by the electorate in the amendment ratified April 1990, sponsored by the plaintiffs. Accordingly, federal court relief via the First Amendment, is not the appropriate remedy.

Assuming that a First Amendment analysis would be appropriate, prohibition of speech by the government can occur in two ways. The government can act to impair communication or the government may act without the intention to impair communication but nevertheless the government's action may have an adverse effect on communicative opportunity. L. Tribe, *American Constitutional Law*, § 12-2 at 790 (2d ed. 1988). The second prong can best be characterized as "abridgment-in which government does not *aim* at ideas or information but seeks a goal independent of communicative content or impact, with the *indirect* result that the flow of information or ideas is in some significant measure constricted." *Id.* at 978.

Here, plaintiffs' argue that the creative use of the governor's veto power enables the Governor to enact laws without passage through both houses of the legislature. Consequently, in order to "repeal" the "new" law, two-thirds of the members in each house must vote to override the Governor's veto. The plaintiffs' allege that this arrangement, authorized by Article V, § 10 of the Wisconsin Constitution is a barrier to the expression of political beliefs, stifles debate and chills the expression of dissenting political views. Evaluating the plaintiffs' claim

requires the Court to determine if the flow of information or ideas has in some significant way been inhibited by the government's action, in this case the pertinent Wisconsin Constitutional provision. Here, there has been no *significant* restriction of the plaintiffs' freedom of expression. As defendant aptly argues in Defendant's Brief in Support of Motion for Summary Judgment at Page 32. "Plaintiffs and their colleagues may fully influence the voting behavior of fellow legislators." The fact that plaintiffs may not be able to convince their fellow legislators to override the Governor's partial veto is not indicative of significant restrictions on their freedom of speech. In addition, although the Court is convinced that freedom of speech concerns are not present here, the fiscal and policy reasons for the allowance of the Governor's partial veto, namely because Wisconsin has *omnibus* appropriation bills, is of such notable concern to the state that any restrictions on free speech is *de minimus* at best. Finally, "[t]he First Amendment protects the right of an individual to speak freely, to advocate ideas, to associate with others, and to petition his government for redress of grievances. And it protects the right of associations to engage in advocacy on behalf of their members." *Smith v. Arkansas State Highway Employees*, 441 U.S. 463, 464 (1978). There is no indication that any of these rights protected by the First Amendment have been infringed by the Governor's use of the partial veto power.

Equal Protection

The Fourth Amendment provides:

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction

> thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

One of the main purposes of the equal protection clause of the Fourteenth Amendment is to assure that the voting power is equally distributed among all citizens of the United States. "[T]he fundamental principle of representative government in this country is one of equal representation for equal numbers of people, without regard to race, sex, economic status, or place of residence within a State." *Reynolds v. Sims*, 377 U.S. 533, 560-61 (1964). "All citizens have an equal interest in representative democracy, and that the concept of equal protection therefore requires that their votes be given equal weight." *Lockport v. Citizens For Community Action*, 430 U.S. 259, 265 (1976).

Plaintiffs' argue that the defendant's use of the partial veto has" the effect of 'expanding' the share of sovereign power that may be exercised by legislators who share the defendant's view, and diluting or 'contracting' the share of sovereign power that may be exercised by legislative opponents. *See* Memorandum in Support of Plaintiffs' Motion for Summary Judgment at Page 24. Plaintiffs' further contend that "[t]he Equal Protection claim is based on the fact that the defendant has invidiously discriminated against all voters of less favored legislative districts – whether they be Republican, Democrat or Independent, by diluting and debasing the votes of their representatives in the Legislature." *See*

Brief in Opposition to Defendant's Motion for Summary Judgment at Page 23.

Applying the equal protection principles herein espoused, there is absolutely no indication that the citizens of the state of Wisconsin have been denied the right to vote or that their votes were not given equal weight. Each citizen, regardless of race, sex, economic status or place of residence may vote for senators, representatives and the Governor. Members of the public have not been denied equal protection pursuant to their voting rights. The plaintiffs, who represent the people, also have not had their votes diluted merely because they do not agree with the Governor's course of action concerning the exercise of a particular partial veto. In addition to the fact that there is no evidence that any voting rights have been diluted, the plaintiffs have failed to demonstrate an identifiable class for invidious discrimination purposes. "We conclude that so long as such provisions do not discriminate against or authorize discrimination against any identifiable class they do not violate the Equal Protection Clause." *Gordon v. Lance,* 403 U.S. 1, 7 (1970). The class plaintiffs attempt to identify are those who are on the opposing side of the bill altered via the Governor's partial veto. Such a group does not constitute a class for this class would be constantly shifting. Each time an elected official made a decision with which another official or a member of the general public did not agree, then those persons would form a class and become the target of invidious discrimination. This concept is absurd and does not comport with the tenants of the equal protection clause. Finally, the germaneness requirement explained by the court in *Wisconsin Senate,* dictates that the bill

which the Governor "creates" by using the partial veto must be germane to the original bill authorized by both houses. Obviously, the elected officials exercised their voting rights during the original debate and passage of the bill. It cannot be seriously contended that an equal protection violation occurred either because a representative did not agree with the original bill or failed to override the related bill altered by the Governor in accordance with the partial veto authority.

Guarantee Clause and Due Process

The Guarantee Clause of the United States Constitution provides in pertinent part as follows:

> The United States shall guarantee to every State . . . a Republican Form of Government, and shall protect each of them against invasion.

Plaintiffs contend that the structure of the partial veto authority allows laws to be passed without the consent of a majority of both houses. Plaintiffs assert that such a governmental structure usurps the rights of the people to have a republican form of government as protected by the due process clause.

When undertaking a guarantee clause analysis one of the prime indicators of a violation is whether the action also infringes upon the equal protection clause. As decided above, the partial veto does not violate the equal protection clause. In addition, the court is in agreement with one of the leading constitutional law scholars that the authority to choose the manner in which state laws are to operate is the very essence of self government. "No doubt both Congress and the federal judiciary are

empowered under the Civil War Amendments to assure that a state's choices of governmental structure respect basic norms of equal protection. And no doubt many options exist, consistent with those basic norms, for implementing the ideals of representative democracy through the requirement of 'republican' form. But the authority to choose among these options – the authority to decide, consistent with equal protection of the laws, how one's people will represent themselves and participate in their own governance – seems the very essence of all self-government. L. Tribe, *American Constitutional Law* § ___ at 398 (2d ed. 1988).

Here, the Wisconsin citizens and their representatives have the undeniable right to enact laws which dictate the structure of their government. The electorate of the state authorized the use of the partial veto, including provisions to override. The distribution of power among members of state government is a state decision. The electorate had a right, consistent with the guarantee clause, to craft Article v, § 10 and the people also have a right to so amend. Such an amendment did occur in April of 1990. Also, the governmental structure set forth in Article V, § 10 contains a number of checks and balances which guarantee not only a republican form of government but insures that the plaintiffs and the citizens of Wisconsin will not have their liberty interests infringed. The checks are as follows: (1) The use of the partial veto authority only extends to omnibus appropriation bills. This authority is necessary because " [t]he Wisconsin Constitution does not prohibit substantive legislation from being included in appropriation bills . . . [T]his

state's constitution does not impose a "one bill one subject" limitation on bills other than the private and local limitation in art. IV., § 18." *Wisconsin Senate* at 450, n. 10; (2) The elected representatives of the people of the State of Wisconsin craft the original appropriation bills sent to the Governor; (3) The Governor, also the people's elected representative, edits and crafts what he believes is an appropriate appropriation bill; (4) The peoples' elected representatives may use their persuasive and political techniques to rally their constituents to override the Governor's proposal; (5) The law that results must be germane to the original bill passed by both houses and (6) The law that remains must be complete and workable. Accordingly, these safeguards and parameters adequately protect the Republican form of government embodied in the Guarantee Clause of the United States Constitution.

Due Process

The Due Process Clause of the United States Constitution provides in pertinent part as follows:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law . . .

The Court is convinced that the liberty interests of the plaintiffs and the citizens of the state have not been infringed due to the authority found in Article V, § 10. As previously stated, there are a number of safeguards that

act as a check on the Governor's power and allow the citizens, through their elected officials, to participate in the consideration and enactment of legislation. Therefore, the Court believes that such guarantees prevent any deprivation of liberty. In addition, the Court is in substantial agreement with the defendant's position espoused at Page 5 of Defendant's Brief in Opposition to Plaintiffs' Motion for Partial Summary Judgment which states:

> Professor Kaminski does rely on Story's *Commentaries* of 1851, in which the justice lectures that 'no laws ought to be passed without the cooperation and consent of the representatives of the people' (plaintiffs' brief at 13-14). This hardly supports the sweeping notion that liberty is deprived when law is made by something other than a majority of the members present in a branch of the Legislature. In any event, the Governor, as much as the legislature, is a representative of the people and, having duly been elected by a majority of those voting, can as legitimately exercise the powers committed to him by the Wisconsin Constitution as the Legislature can exercise the powers committed to it.

Pursuant to the analysis concerning the Guarantee Clause, the people have a right to structure their government in a way they choose. The structure at issue does not deprive the people of liberty simply because the Governor exercises his partial veto authority pursuant to a constitutional provision approved by the Wisconsin Supreme Court in *Wisconsin Senate*, and makes a decision with which not everyone agrees. If the people of the State of Wisconsin are concerned with the manner in which appropriation bills are enacted then the appropriate remedy is for them to correct the situation "at the ballot box or by constitutional amendment". *Wisconsin Senate* at 465.

In conclusion the Court finds that the authority for the Governor's exercise of the partial veto, Article V, § 10 of the Wisconsin Constitution, substantially complies with the United States Constitution and does not violate plaintiffs' rights protected by the First or Fourteenth Amendments or the Guarantee Clause.

ORDER

IT IS ORDERED that plaintiffs' motion for partial summary judgment is DENIED.

IT IS FURTHER ORDERED that defendant's motion for summary judgment is GRANTED.

IT IS FURTHER ORDERED that judgment shall be entered in favor of the defendant against the plaintiffs dismissing their complaint and all claims contained therein with prejudice and costs.

Entered this 24th day of August, 1990.

BY THE COURT:

/s/ John C. Shabaz
JOHN C. SHABAZ
District Judge

JUDGMENT IN A CIVIL CASE

UNITED STATES DISTRICT COURT	DISTRICT WESTERN DISTRICT OF WISCONSIN
CASE TITLE SENATOR FRED A. RISSER and REPRESENTATIVE DAVID M. TRAVIS V. TOMMY G. THOMPSON	DOCKET NUMBER 90-C-215-S
	NAME OF JUDGE OR MAGISTRATE JUDGE JOHN C. SHABAZ

[ ] **Jury Verdict**. This action came before the Court and a jury with the judicial officer named above presiding. The issues have been tried and the jury has rendered its verdict.

[X] **Decision by Court.** This action came for consideration before the Court with the judge named above presiding. The issues have been considered and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

That judgment shall be entered in favor of the defendant against the plaintiffs dismissing their complaint and all claims contained therein with prejudice and costs.

CLERK	DATE
/s/ Joseph M. Skupniewitz	8-24-90

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WISCONSIN

Senator FRED A. RISSER, and
Representative DAVID M. TRAVIS,

Plaintiffs,

v.

Civil Action No.
90-C-0215S

TOMMY G. THOMPSON, Governor
of the State of Wisconsin,

Defendant.

AFFIDAVIT OF DR. JOHN P. KAMINSKI CONCERNING THE ORIGINAL UNDERSTANDING OF THE CONCEPT OF LIBERTY

STATE OF WISCONSIN)
) ss.
COUNTY OF DANE)

John P. Kaminski, being duly sworn, states that:

I. Introduction

1. I make this affidavit in support of Plaintiff's Motion for Summary Judgment on the basis of my own personal knowledge.

2. I earned a Ph.D. in American History from the University of Wisconsin-Madison in 1972.

3. Since May of 1981, I have served as Director of the Center for the Study of the American Constitution at the University of Wisconsin-Madison ("the Center"), which maintains extensive archives of documents relating

to the drafting and ratification of the Constitution of the United States and the Bill of Rights.

4. The Center hosts research scholars from around the world, conducts its own research, and offers courses, lectures and consulting services.

5. The Center has published, or is in the process of publishing, *The Documentary History of the Ratification of the Constitution* (21 volumes); *The Documentary History of the First Federal Elections* (4 volumes); *The Constitutional Heritage Series;* and a number of forthcoming monographs.

6. Since March of 1970, I have served as Associate Editor, Co-editor and/or Director of *The Documentary History of the Ratification of the Constitution.*

7. I am the co-editor of *The Constitution and the States: The Role of the Original Thirteen in the Framing and Adoption of the Federal Constitution* (Madison, 1988), *Federalists and Antifederalists* (Madison, 1989) and a number of forthcoming books concerning the Constitution and the Bill of Rights.

8. I am also the author of many scholarly articles and papers, including "The U.S. Constitution: A Product of 18th Century Theory and Practice."

9. My work as a professional historian includes the reading and evaluation of primary and secondary sources, primarily with respect to the drafting and ratification of the Constitution of the United States, in order to form opinions, draw inferences and make judgments as to what actually took place, what persons actually

believed, and how those beliefs are related to what actually happened.

II. The Sources

10. In preparing this affidavit, I have personally examined seven published reference works, and have verified that the photocopies of pages of those works, which are appended to this affidavit as Exhibits A through G, are true and correct copies of the pages from which they were photocopied.

11. Citations to the exhibits include the letter of the Exhibit and the original page number of the reference work involved (except for citations which refer to unnumbered title or copyright pages, in which case the page number is omitted).

12. Each Exhibit contains notations in the margin to the left of each quoted or paraphrased statement in order to assist in locating the cited text.

13. Exhibit A consists of pages from the first volume of Thomas M. Cooley's Third Edition of William Blackstone's classic *Commentaries on the Laws of England* (Chicago: Callaghan and Company, 1884), which consists of Blackstone's text as revised by the author between the initial completion of the work in November of 1765 and the addition of a Postscript at an unspecified later date, with notes and references that were added by Cooley for his Third Edition, which was published in 1884. *See* Ex. A, xxxv.

14. Exhibit B consists of pages from F. W. Maitland's classic *The Constitutional History of England* (Cambridge:

Cambridge University Press, 1950), which was compiled from lectures delivered in 1887 and 1888, and published as a book in 1908 "as they were delivered" with the exception of a "few places where the manuscript took the form of brief notes which have been expanded," and the reconstruction of a missing page from two notebooks. Ex. B, v-vii.

15. Exhibit C consists of pages from R. F. Tapsell's *Monarchs Rulers Dynasties and Kingdoms of the World* (New York: Facts on File Publications, 1983), which reflects the dates inserted in brackets in certain quotations from other sources that refer to the reign of a particular monarch. *See* Ex. C.

16. Exhibit D consists of pages from *The Eighteenth-Century Constitution 1688-1815: Documents and Commentary* (Cambridge: Cambridge University Press, 1960), a volume of documents and commentary that was compiled by E. Neville Williams and published by the Cambridge University Press as part of a series of works on the English Constitution. *See* Ex. D.

17. Exhibit E consists of pages from the classic *Commentaries on the Constitution of the United States* (Boston: Charles C. Little and James Brown, 1851), which was first published in 1833 by Joseph Story, who served as a Justice of the United States Supreme Court and as Dane Professor of Law in Harvard University, and was republished in 1851 with "[n]o change . . . in the original text." *See* Ex. D.

18. Exhibit F consists of pages from the first volume of a four-volume anthology of historical documents entitled *The Founders' Constitution* (Chicago: University of

Chicago Press, 1987), which was edited by Philip B. Kurland, "the William R. Kenan, Jr., Distinguished Service Professor in the College and Professor in the Law School" at the University of Chicago, and by Ralph Lerner, "Professor in the Committee on Social Thought and in the College" at the University of Chicago. *See* Ex. F.

19. Exhibit G consists of pages from a seven volume collection entitled *The Federal and State Constitutions, Colonial Charters, and Other Organic Laws of the States, Territories, and Colonies* . . . (Washington, D.C.: Government Printing Office, 1909), which was compiled and edited, pursuant to an Act of Congress dated June 30, 1906, by Francis Newton Thorpe – a Ph. D. and LL. D. – who served as a professor of American Constitutional History at the University of Pennsylvania between 1885 and 1898 and was the author of a number of books concerning American Constitutional History. *See* Ex. G.

20. Paragraphs 21 through 23 express my opinions as a professional historian in the field of American Constitutional History with respect to the accuracy and reliability of the foregoing sources.

21. Each of the foregoing sources is recognized by professional historians in the field either as an authoritative commentary (Exhibits A, B, and E), or as an authoritative compilation of facts or documentary sources (Exhibits C, D, F and G).

22. Each of the reference works involved is a type of work that is reasonably relied upon by professional historians in the field in making judgments, forming opinions and drawing inferences.

23. In my opinion, the accuracy and reliability of the foregoing sources cannot be reasonably questioned with respect to the substance and meaning of the passages that are quoted or paraphrased below.

24. I have personally compared the statements set forth below with the pages that are cited as their source, and have verified that each quotation or paraphrased statement accurately reflects the cited text and is consistent with the meaning and context of the relevant passage or passages that are cited.

25. In preparing this Affidavit, I also have examined my Affidavit concerning the Original Understanding of the Guarantee Clause, and the Exhibits that are attached thereto, which is being submitted herewith.

III. The English Inheritance of Representative Government

26. William Blackstone identifies "[t]he constitution, powers, and privileges of parliament" as one of "the rights, or . . . liberties of Englishmen." Ex. A, 140, 144.

27. Blackstone states that "the constitution" "of parliament" and certain other rights serve as "barriers to protect and maintain inviolate the three great and primary rights, of personal security, personal liberty [defined as the power of locomotion,] and private property." Ex A, 140, 143 and 134.

28. In this context, Blackstone observes that Parliament consists of the Crown, the House of Lords and the House of Commons, and that "the *consent* of all three is

required to make *any new law* that shall bind the subject." (emphasis added) Ex. A, 160.

29. "[T]he law must perpetually stand as it now does," Blackstone says, "unless all the powers will *agree* to alter it." (emphasis added). Ex. A, 154.

30. Blackstone adds that, "[w]hatever is enacted for law by one, or by two only, of the three, is no statute; and to it no regard is due." Ex. A, 160.

31. According to Blackstone, the role of the House of Commons was based on the premise that, "[i]n a free state every man, who is supposed a free agent, ought to be in some measure his own governor; and therefore a branch at least of the legislative power should reside in the whole body of the people." Ex. A, 158.

32. The House of Commons, in Blackstone's view, gave all "men of property . . . a voice in parliament, either personally, or by his representatives." Ex. A. 158.

33. At a later point, Blackstone adds that "every man in England is, in judgment of law, party to the making of an act of parliament, being present thereat by his representatives." Ex. A, 185.

34. For Blackstone, "the true excellence of the English government" lay in the fact that "all the parts of it form a mutual check upon each other." Ex. A, 154-155.

35. "In the legislature," he explains, "the people are a check upon the nobility, and the nobility a check upon the people; by the mutual privilege of *rejecting* what the other has resolved: while the king is a check upon both. . . . " (emphasis added) Ex. A, 155.

36. In this context, Blackstone emphasizes that "the share of legislation, which the constitution has placed in the crown, consists in the power of *rejecting* rather than *resolving*" because "the power of *rejecting*" is sufficient to preserve "the executive power from encroachments." (emphasis in original) Ex. A, 154-155.

37. Blackstone adds that the King's "power of *rejecting*" was "not any power of *doing* wrong, but merely of *preventing* wrong from being done." (emphasis in original) Ex. A, 154.

38. "The crown cannot begin of itself any alterations in the present established law," Blackstone continues, "but it may approve or disapprove of the alterations suggested and *consented* to by the two houses." (emphasis added) Ex. A, 154.

39. Under these circumstances, Blackstone observes, the Crown, the Commons and the Lords "jointly impel the machine of government in a direction different from what either, acting by itself, would have done; but at the same time in a direction partaking of each, and formed out of all. . . . " Ex. A, 155.

40. In this context, F.W. Maitland states, in *The Constitutional History of England*, that it was "an admitted principle," as early as 1322, "that the *consent* of both houses was necessary for a statute." (emphasis added) Ex. B, 186.

41. "[B]y the beginning of Edward III's reign [in 1327]," Maitland adds, "it was an established principle that nothing was to go on to the statute roll save what

had received the *consent* of king, lords and commons." (emphasis added) Ex. B, 186-187; *See* Ex. C, 176.

42. Prior to 1414, Maitland states, it was the established practice for the King, with the assent of the House of Lords, to grant the petition of the House of Commons for the enactment of a statute. Ex. B, 188-189; *See* Ex. A, 181-182.

43. However, Maitland observes, the resulting statutes were "not drawn up until after the parliament" was dissolved, and the House of Commons repeatedly protested that, when the petitions were turned into statutes by the king's council, the result often did "not correspond very closely with the petition." Ex. B, 189.

44. In 1414, Maitland states, the House of Commons prayed " 'that there never be no law made and engrossed as statute and law *neither by additions nor diminutions* by no manner of term or terms the which should change the sentence and the intent asked.' " (emphasis added) Ex. B, 189.

45. In reply, Maitland adds, the King granted that "henceforth 'nothing be enacted to the petition of the commons contrary to their asking, whereby they should be bound *without their assent*.' " (emphasis added) Ex. B, 189.

46. It was following this development, Maitland recounts, that "the practice is introduced of sending up to the king not a petition but a bill drawn in the form of a statute, so that the king shall have nothing to do save to assent or dissent." Ex. B., 189.

47. In this context, Blackstone states that it was during the "reign of Henry V [between 1413 and 1422], to prevent mistakes and abuses, [that] the statutes were drawn up by the judges [from the petitions passed by Parliament] *before* the end of the parliament." (emphasis added) Ex. A, 182; *See* Ex. C, 176.

48. Blackstone adds that, "in the reign of Henry VI [between 1422 and 1461], bills in the form of acts, according to the modern custom, were first introduced. Ex. A, 182; *See* Ex. C, 176.

49. From the reign of Henry VII [which began in 1485] to at least the 1880's Maitland declares, the formula for enactment of legislation has contained the recitation that " 'The King . . . by the *assent* of the Lords spiritual and temporal and the commons in . . . parliament assembled and by the authority of the same parliament hath done to be made certain statutes and ordinances in the manner and form following.' " (emphasis added) Ex. B, 184; *See* Ex. C, 176.

50. Maitland adds that, by the formula for legislation, "[i]t is admitted . . . that a statute derives its authority from the whole parliament." Ex. B, 185.

51. Blackstone observes that, with the abdication of King James II, and the accession of William and Mary to the throne in 1689, "a new era commenced [ie. 1689 to 1765 and beyond], in which the bounds of prerogative and liberty have been better defined, the principles of government more thoroughly examined and understood, and the rights of the subject more explicitly guarded by legal provisions, than in any other period of the English history." Ex. A, 212; *See* Ex. C, 176.

52. The abdication of King James II, and the accession of William and Mary, led to the enactment of the English Bill of Rights in 1689. Ex. D, 26-30; *See* Ex. A, 211.

53. The English Bill of Rights declares that "King James The Second . . . did endeavour to subvert . . . the laws and liberties of . . . " the kingdom: "1. By assuming and exercising a [prerogative] power of dispensing with and suspending of laws, and the execution of laws, without consent of parliament . . . [and] 4. By levying money for . . . use of the crown, by pretence of prerogative, for other time, and in other manner, than the same was granted by parliament." Ex. D, 26-27.

54. The English Bill of Rights declares that the acts described in the preceding paragraph "are utterly and directly contrary to the known laws and statutes, and freedom of this realm." Ex. D, 27.

55. The English Bill of Rights then declares: "1. That the pretended power of suspending of laws, or the execution of laws, by regal authority, *without consent of parliament*, is illegal. 2. That the pretended power of dispensing with laws, or the execution of laws, by regal authority, as it hath been assumed and exercised of late, is illegal . . . [and] 4. That levying money for . . . use of the crown, by pretence of prerogative, *without grant of parliament*, for longer time, or in other manner than the same is or shall be granted, is illegal." (emphasis added) Ex. D, 28.

56. The English Bill of Rights further declares that "the rights and liberties asserted . . . are the true, ancient, and indubitable rights and liberties of the people of this kingdom, and so shall be esteemed. . . . " Ex. D, 30.

57. The abdication of King James II, and the accession of William and Mary, also led to the enactment of a statute prescribing a new coronation oath. Ex. D, 36-37.

58. According to Maitland, the words of the old coronation oath had raised a question whether "the kings are [bound] to uphold the old law, the law which the people *had* chosen, not the laws which the people *should* choose [in the future]. (emphasis added) Ex. B, 287.

59. Blackstone quotes the words of the new coronation oath as follows: " 'Will you solemnly promise and swear to govern the people of this kingdom of England, and the dominions thereto belonging, according to *the statutes in parliament agreed on*, and the laws and customs of the same?' " (emphasis added) Ex. A, 235; *see* Ex. D, 37.

60. Blackstone adds that the statute required the king or queen to respond, " 'I solemnly promise so to do.' " Ex. A, 235; *See* Ex. D, 37.

61. Maitland declares, in this context, that "[t]he most important phrase [in the new coronation oath] is this – the king promises to govern the people of England . . . according to the statutes *in parliament agreed on*, and the laws and customs of the same." (emphasis added) Ex. B, 287-288.

62. It was in the aftermath of the events described in paragraphs 26 through 61 that Blackstone contends, writing about 1765, "that the English is the only nation in the world where political or civil liberty is the direct end of its constitution." Ex. A, 145.

63. In this context, Blackstone contrasts the English system of government with "tyrannical governments" in

which "the right both of *making* and of *enforcing* the laws, is vested in one and the same man. . . . " (emphasis in original) Ex. A, 145-146.

64. "[W]herever these two powers [of making and enforcing the laws] are united together," Blackstone concludes, "there can be no public liberty." Ex. A, 146.

65. Blackstone adds that it is "necessary," for the preservation of "the rights, or . . . liberties of Englishmen," "that the constitution of parliament be supported in its full vigour; and limits, certainly known, be set to the royal prerogative." Ex. A, 144.

IV. The Development of Representative Government in America

66. In discussing the development of representative government in America, Joseph Story states that the American colonists were conscious "of the full possession of the rights, liberties and immunities of British subjects," and that they valued "above all others, the right of representation in Parliament, as the only real security for their political and civil liberties. . . . " Ex. E, 111.

67. Story notes, however, that the first charter of the Virginia colony placed "the whole legislative and executive powers in a council nominated by the crown," in the period prior to the establishment of "the first representative legislature that ever sat in America" in 1619. Ex. E, 18-19.

68. Story declares that, "[b]y placing the whole legislative and executive powers" in such a council, the early

colonists were "bereaved of the noblest privileges of a free man." Ex. E, 19.

69. Story adds, while writing in 1832 or 1833, that the terms of the first Virginia charter "would now be rejected with disdain as a violent invasion of the sacred and inalienable rights of liberty." Ex. E, 19; *See* Ex. E, ix.

70. In reviewing the development of representative government in America, Story observes that "local legislatures were established" in each of the colonies. Ex. E, 111.

71. In each colonial legislature, Story adds, "one branch . . . consisted of representatives of the people freely chosen, to represent and defend their interests, *and possessing a negative upon all laws.*" (emphasis added) Ex. E, 111.

72. In the period prior to 1660, Story declares, "all the colonies . . . [except Maryland] had "settled a model of government for themselves, in which the people had *a voice, and representation in framing the laws, and in assenting* to the burthens to be imposed upon themselves." (emphasis added) Ex. E, 112.

73. After 1660, he adds, "there was no instance of a colony without a representation of the people, nor any attempt to deprive the colonies of this privilege, except during the brief and arbitrary reign of King James the Second [between 1685 and 1689]." Ex. E., 112; *See* Ex. C, 176.

74. Story states that "the right of the people to be governed by laws established by a local legislature, in

which they were represented, was recognized as a fundamental principle . . . " in the proprietary and charter governments that were established in some of the colonies. Ex. E, 113.

75. In the remaining royal provinces, Story adds, the colonists also maintained that "the people had a *right* to be represented in the legislature," but the crown asserted that such representation was merely "a privilege enjoyed . . . during the pleasure of the crown." (emphasis in original) Ex. E, 113.

V. The Rationale of the American Revolution

76. In the period between the passage of the Stamp Act in 1765 and the issuance of the Declaration of Independence in 1776, Story says, Americans began to question the authority of Parliament to enact legislation for the colonies. Ex. E, 133.

77. Story states that Americans passed from "a denial, first, of the power of taxation, and next, of all authority whatever to bind them by its laws." Ex. E, 133.

78. In October of 1774, for example, the First Continental Congress issued a Declaration of Rights, which declared "[t]hat the foundation of English liberty, and of all free government, is a right in the people to participate in their legislative council: and as the English colonists are not represented . . . in the British parliament, they are entitled to a free and exclusive power of legislation in their several provincial legislatures, where their right of representation can alone be preserved, in all cases of taxation and internal polity. . . . " Ex. F, 2.

79. The Declaration of Rights adds that the "indubitable rights and liberties" of the American colonists "cannot be legally taken from them, altered or abridged by any power whatever, without their own consent, by their representatives in their several provincial legislatures." Ex. F, 2-3.

80. However, Story notes, the Declaration of Rights "admitted from the necessity of the case . . . that parliament might pass laws *bona fide* for the regulation of external commerce, though not to raise a revenue. . . . " (emphasis in original) Ex. E, 134; *See* Ex. F, 2.

81. On March 22, 1775, Edmund Burke, a member of the British Parliament, made a speech on conciliation with the colonies. Ex. F, 3.

82. Burke states that the "spirit of liberty is stronger in the English colonies [as of 1775] . . . than in any other people of the earth. . . . " Ex. F, 3.

83. Burke observes that the American colonists were "not only devoted to liberty, but to liberty according to English ideas, and on English principles. . . . " Ex. F, 3.

84. Burke also points out that Americans argued, "from the particular nature of a House of Commons, as an immediate representative of the people," that it is "a fundamental principle" that "the people must . . . mediately or immediately, possess the power of granting their own money, or no shadow of liberty could subsist." Ex. F, 4.

85. After the outbreak of hostilities between Great Britain and the colonies, Story declares, "the struggle"

was "maintained upon the general ground" that Parliament had no authority "to bind" the American colonies "by its laws." Ex. E, 133.

86. On March 26, 1776, for example, South Carolina adopted a Constitution, which stated that Parliament had asserted an "unconstitutional" claim that it had "a right to bind the North American colonies by law in all cases whatsoever, [and accordingly] have enacted statutes . . . without the consent and against the will of the colonists. . . . " Ex. G, 3241.

87. On June 29, 1776, Virginia adopted a Constitution, which stated a list of grievances against the King of Great Britain, including the charge that he had combined with Parliament "to subject us to a foreign Jurisdiction, [by] giving his assent to their pretended Acts of Legislation . . . for cutting off our Trade with all parts of the World; for imposing Taxes on us without our Consent . . . for transporting us beyond the Seas, to be tried for pretended Offenses; [and] for suspending our own Legislatures, and declaring themselves invested with power to legislate for us in all Cases whatsoever." Ex. F, 7.

88. On July 3, 1776, New Jersey adopted a Constitution, which charged the King, among other things, with "assenting to sundry acts of the British parliament," and thereby attempting to subject "the good people of these colonies . . . to the absolute dominion of that body." Ex. G, 2594.

89. On July 4, 1776, the Second Continental Congress adopted the Declaration of Independence, which justified independence – in part – because the King had

demanded that some colonies "relinquish the right of Representation in the Legislature," and had combined with Parliament "to subject" Americans "to a jurisdiction foreign to our constitution, and unacknowledged by our laws; [by] giving his Assent to their Acts of pretended Legislation . . . For cutting off our Trade with all parts of the world . . . For imposing Taxes on us without our Consent . . . For transporting us beyond Seas to be tried for pretended offenses . . . [and] For suspending our own Legislatures, and declaring themselves invested with power to legislate for us in all cases whatsoever." Ex. F, 10.

90. By May of 1777, five additional states had also adopted Constitutions for Declarations of Rights, which stated that infringement of the right of representation in the legislature was a cause of the Revolution. Georgia, Ex. G, 777; Maryland, Ex. G, 1686; New York, Ex. G, 2623-2627; North Carolina, Ex. G, 2789; and Pennsylvania, Ex. G, 3081.

91. For example, the Maryland Declaration of Rights, which was adopted as part of the 1776 Constitution of that State, asserted that Parliament had declared "a right to make laws to bind the Colonies in all cases whatsoever, and, in pursuance of such claim, [had] endeavoured, by force of arms, to subjugate the United Colonies to an unconditional submission to their will and power. . . . " Ex. G, 1686.

VI. The Concept of Liberty and the Prescriptions for Legislative Action Established by the Original Constitutions of the American States

92. The 1776 Constitutions of Maryland and Pennsylvania contain express statements that link the concept

of liberty and the right of representation in the legislature. *See* Ex. G, 1687 and 3086.

93. In this context, the Maryland Declaration of Rights states that "the right in the people to participate in the Legislature is the best security of liberty, and the foundation of all free government." Ex. G, 1687.

94. The Maryland Declaration of Rights also states that "elections ought to be free and frequent" for the "purpose" of securing "the right in the people to participate in the Legislature." Ex. G, 1687.

95. The declaration in the preceding paragraph may be compared with Blackstone's observation that, "In England, where the people do not deliberate in a collective body but by representation, the exercise of this sovereignty [of the people] consists in the choice of representatives." Ex. A, 171.

96. Blackstone adds that, "In each house [of Parliament] the act of the majority binds the whole. . . . " Ex. A, 181.

97. The Pennsylvania Constitution of 1776 also linked the concept of liberty with representation in the legislature. Ex. G, 3086.

98. The Pennsylvania Constitution established a unicameral legislature and declared that "representation in proportion to the number of taxable inhabitants is the only principle which can at all times secure liberty, and make the voice of a majority of the people the law of the land. . . . " Ex. G, 3086.

99. The Declaration of Independence states that governments derive "their just powers from the consent of the governed." Ex. F, 9.

100. During the period between January 5, 1776, and July of 1780, the States of Virginia (Ex. F, 7-8), Massachusetts (Ex. F, 11, 14-16), Delaware (Ex. G, 562-563), Georgia (Ex. G, 777-779), Maryland (Ex. G, 1686, 1691-1695, 1701), New Hampshire (Ex. G, 2451-2452), New Jersey (Ex. G, 2594-2596), New York (Ex. G, 2628-2629), North Carolina (Ex. G, 2790-2791), Pennsylvania (Ex. G, 3084-3086), and South Carolina (Ex. G, 3241, 3244), each adopted a written constitution, which established a legislature for the making of laws with at least one branch that was representative of the electorate.

101. Three of these state constitutions contain explicit statements that the function of a representative legislature is to express the consent of the governed with respect to each exercise of the legislative power.

102. The Virginia Declaration of Rights declared, for example, that citizens "cannot be taxed or deprived of their property for publick uses without their own *consent* or that of their Representative . . . *nor bound by any law* to which they have not, in like manner, *assented*, for the publick good." (emphasis added) Ex. F, 6.

103. The Virginia Constitution established a bicameral legislature and declared that, "All Laws shall originate in the House of Delegates, to be *approved* or rejected by the Senate or to be amended with the *Consent* of the House of Delegates; except Money Bills, which in no instance shall be altered by the Senate but wholly *approved* or rejected." (emphasis added) Ex. F, 8.

104. The Pennsylvania Constitution, which was adopted on September 28, 1776, declared that "no part of a man's property can be justly taken from him, or applied to public uses, without his own *consent*, or that of his legal representatives . . . *nor are the people bound by any laws*, but such as they have in like manner *assented* to, for their common good." (emphasis added) Ex. G, 3083.

105. The Pennsylvania Constitution established a unicameral legislature and declared that proposals for legislation "shall not be *passed* into laws" without certain procedural steps to assure that proposed laws would be "maturely considered." (emphasis added) Ex. G, 3084, 3086.

106. The Massachusetts Declaration of Rights, which was adopted as part of the 1780 Constitution, contained a declaration that "no part of the property of any individual, can, with justice, be taken from him, or applied to public uses without his own *consent*, or that of the representative body of the people." (emphasis added) Ex. F, 11-12.

107. The Massachusetts Declaration added that "the people of this Commonwealth are *not controlable by any other laws*, than those to which there constitutional representative body have given their *consent*." (emphasis added) Ex. F, 12.

108. The Massachusetts Constitution established a bicameral legislature, authorized the House to "originate" money bills, gave the Senate power to "propose or *concur* with amendments, as on other bills," and made clear that each branch of the legislature would "have a negative on the other." (emphasis added) Ex. F, 14, 16.

109. In this context, the Massachusetts Constitution provided for a House of Representatives that was apportioned to provide "a representation of the people . . . founded upon the principle of equality." Ex. F, 16.

110. Although the Massachusetts Senate was designed to represent interests in property, no law could be enacted in the State of Massachusetts without the affirmative consent of "the people," as expressed by at least a majority of the members present and voting in the House of Representatives. Ex. F, 14-16.

111. Other states used different terms to express the view that no law could be enacted without the consent of the people and their representatives in the state legislature.

112. The Maryland Constitution implemented "the right in the people to participate in the Legislature" by establishing a bicameral legislature and prescribing that each bill must be *"passed by,"* and have the *"assent"* of, each branch of the legislature. (emphasis added) Ex. G, 1687, 1691-1695, 1701.

113. The North Carolina Declaration of Rights stated that "the execution of laws, by any authority, without *consent* of the Representatives of the people, is injurious to their rights, and ought not to be exercised." (emphasis added) Ex. G, 2787.

114. The North Carolina Constitution established a bicameral prescription for legislative action, which authorized each branch of the legislature to "prepare bills, to be *passed* into laws," and required that "all bills shall be

read three times in each House, before they *pass* into laws. . . . " (emphasis added) Ex. G, 2790-2791.

115. The New York Constitution of 1777 declared "that no authority shall, on any pretence whatever, be exercised over the people or members of this State but such as shall be derived from and granted by them." Ex. G, 2628.

116. The New York Constitution vested "the supreme legislative power" of the State in a bicameral legislature and declared that all proposals for legislation must "have *passed* the senate and assembly . . . before they become laws." (emphasis added) Ex. G, 2628-2629.

117. The New York Constitution made clear that the right of representation in the legislature was the institutional mechanism for granting "authority . . . over the people" by prescribing an enacting clause for each bill, which read, "Be it enacted by the people of the State of New York, represented in senate and assembly." (emphasis omitted) Ex. G, 2628, 2635.

118. The Constitution of New Hampshire, which was adopted in January of 1776, prescribed a bicameral process for the making of laws and declared "that no act or resolve shall be valid and put into execution *unless agreed to, and passed by* both branches of the legislature." (emphasis added) Ex. E, 2451-2452.

119. Each of the four remaining states, which adopted written constitutions during the period between January of 1776 and July of 1780, also established a representative legislature for the making of laws, and explicitly or implicitly required that each proposal for

legislation must be passed by, or have the assent of, each chamber of the legislature involved, before it could become a valid law. (Delaware, Ex. G, 562-563; Georgia, Ex. G, 777-779; New Jersey, Ex. G, 2594-2596; and South Carolina, Ex. G. 3241, 3244).

VII. The Concept of Liberty and the Prescription for Legislative Action in the Constitution of the United States

120. The Preamble of the Constitution of the United States declares that the Constitution was ordained and established to "secure the Blessings of Liberty to ourselves and our Posterity. . . . " Ex. F, 29.

121. In discussing the "Blessings of Liberty" clause, Story declares that "[t]he grand design of the state governments is, doubtless, . . . " to establish "institutions, which . . . may continue . . . the practice of liberty. . . . " Ex. E, 357.

122. Story adds that, just as "the preamble of a statute is a key to open the mind of the makers . . . as to the . . . objects, which are to be accomplished by the provisions of the statute," so "equal attention should . . . be given to the intention of the framers, as stated in the preamble" to the Constitution. Ex. E, 326-327.

123. In this context, Article I, Section 2, of the Constitution provides for the establishment of a House of Representatives that is elected "by the People," with the voters in each State having "the Qualifications requisite for Electors of the most numerous Branch of the State Legislature." Ex. F, 29.

124. Article I, Section 7, of the Constitution contains a prescription for legislative action, which provides that "All Bills for raising Revenue shall originate in the House of Representatives; but the Senate may propose or concur with Amendments as on other Bills." Ex. F, 30.

125. Article I, Section 7 also declares that "Every Bill . . . *shall have passed* the House of Representatives and the Senate . . . before it become a Law. . . . " (emphasis added) Ex. F, 30-31.

126. Although the United States Senate is designed to represent "each State," no law may be enacted by the government of the United States without the affirmative consent of "the people" of the United States, as expressed by at least a majority of the members present and voting in the House of Representatives. Ex. F, 29-31.

127. In discussing the distribution of governmental power, Story declares that it "is indispensable to public liberty" that "the legislative, executive, and judicial powers [be placed] in different hands." Ex. E, 368.

128. Story quotes Blackstone for the proposition that " 'It is highly necessary . . . that the executive power should be a branch, though not the whole of the legislative . . . [because a] total union of them . . . would be productive of tyranny." Ex. E, 369.

129. Story also quotes passages from Blackstone that are quoted or paraphrased in paragraphs 36 through 38 and 63 through 64 above. Ex. E, 365, 369.

130. Story adds that, "The Founders of our Republics, . . . under the influence and the dread of the royal prerogative, . . . never for a moment seem to have turned

their eyes from the immediate danger to liberty from that source . . . . " Ex. E, 373.

131. In discussing the role of the Senate, Story makes clear that the division of legislative and executive power provides "a salutary check on the government," which provides "security to the people." Ex. E, 391; *See* Ex. E, 387-389.

132. The statement in the preceding paragraph is apparent from Story's statement that the division of the legislative power between the House and the Senate "doubles the security to the people, by requiring the concurrence of two distinct bodies . . . " for the enactment of legislation. Ex. E, 391.

133. In discussing the role of the House, Story declares that, "The American people had long been in the enjoyment of the privilege of electing at least one branch of the legislature; and . . . justly thought, that . . . it was essential to their rights and liberties, that the most numerous branch should have an immediate dependence upon . . . the people." Ex. E, 395.

134. Story adds that Americans "knew the inestimable value of the house of commons . . . and they believed, that it had at all times furnished the best security against the oppressions of the crown and the aristocracy." Ex. E, 396.

135. In addition, Story continues, "Experience, as well as theory, had settled it in their minds, *as a fundamental principle of a free government, and especially of a republican government*, that no laws ought to be passed without

the cooperation and consent of the representatives of the people . . . . " (emphasis added) Ex. E, 396.

136. Story declares "that a fundamental principle of public liberty has been . . . secured to ourselves and our posterity" by the constitutional requirement that no law may "be passed without the cooperation and consent of the representatives of the people" in the national House of Representatives. Ex. E, 396-397.

137. Story concludes that, "No law or resolution can be passed without the concurrence first of a majority of the people, and then of a majority of the states." Ex. E, 494.

VIII. Expert Opinion Concerning the Original Understanding of the Concept of Liberty

138. On the basis of the information set forth in Parts II through VII of this Affidavit, and the attached exhibits, I have formed the following opinions concerning the "original understanding" of the concept of liberty.

139. During the period between the adoption of the Declaration of Independence and the ratification of the Constitution of the United States in 1788, the concept of liberty included the right of "self-government."

140. The right to "self-government" was also described as "the right of representation" or "the right to participate in the legislature" or as "liberty."

141. The essence of the right of "liberty" or "self-government" was the right of citizens: (1) to participate in the consideration and enactment of legislation through

their elected representatives in a branch of the legislature that was established to provide a representation of the people who comprised the electorate; and (2) to give or withhold their consent to the enactment of all legislation, by at least a majority vote of the members present and voting in that branch of the legislature.

142. The right of self-government provided a measure of security against the enactment of arbitrary or improvident legislation by: (1) subjecting each proposal for legislation to scrutiny in a step-by-step deliberative process by the representatives of the people; and (2) assuring that no law could be enacted without the affirmative consent of "the people" as expressed by at least a majority of the members present and voting in the branch of the legislature that was composed of their representatives.

143. In my opinion, Justice Story was correct in concluding that it is *"a fundamental principle of a free government, and especially of a republican government,* that no laws ought to be passed without the cooperation and consent of the representatives of the people . . . . " (emphasis added) Ex. E, 396.

144. When the Constitution of the United States was adopted to "secure the Blessings of Liberty to ourselves and our Posterity," the Framers were speaking primarily of liberty as a right of self-government through the representatives of the people in legislative bodies.

145. When Abraham Lincoln spoke at Gettysburg of "a nation conceived in liberty" and of "government of the people, by the people, [and] for the people," he was speaking of the same concept of self-government.

146. Thus, historically, it has been a fundamental principle of American government, which lies at the base of all of our civil and political institutions, that no law may be enacted – consistent with the concept of liberty – without the affirmative consent of "the people" as expressed by at least a majority of the elected representatives present and voting in at least one branch of the Congress or a state legislature.

147. Liberty meant self-government and self-government meant that no law could be enacted without the concurrence and consent of the elected representatives of the people in the Legislature.

Dated: June 9, 1990.

/s/ John P. Kaminski
John P. Kaminski Ph.D.

Subscribed and sworn to
before me this 9th day
of June, ___ 1990.

/s/ Cheryl A. Theis
Notary Public
Dane County, Wisconsin

My Commission expires: 8/23/92

(Exhibits are Omitted)

* * *

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WISCONSIN

Senator FRED A. RISSER, and
Representative DAVID M. TRAVIS,

Plaintiffs,

v.

TOMMY G. THOMPSON, Governor of the State of Wisconsin,

Defendant.

Civil Action No. 90-C-0215S

AFFIDAVIT OF DR. JOHN P. KAMINSKI CONCERNING THE ORIGINAL UNDERSTANDING OF THE GUARANTEE CLAUSE

STATE OF WISCONSIN)
) ss.
COUNTY OF DANE)

John P. Kaminski, being duly sworn, states that:

I. Introduction

1. I make this affidavit in support of Plaintiff's Motion for Summary Judgment on the basis of my own personal knowledge.

2. I earned a Ph.D. in American History from the University of Wisconsin-Madison in 1972.

3. Since May of 1981, I have served as Director of the Center for the Study of the American Constitution at the University of Wisconsin-Madison ("the Center"), which maintains extensive archives of documents relating

to the drafting and ratification of the Constitution of the United States and the Bill of Rights.

4. The Center hosts research scholars from around the world, conducts its own research, and offers courses, lectures and consulting services.

5. The Center has published, or is in the process of publishing, *The Documentary History of the Ratification of the Constitution* (21 volumes); *The Documentary History of the First Federal Elections* (4 volumes); *The Constitutional Heritage Series;* and a number of forthcoming monographs.

6. Since March of 1970, I have served as Associate Editor, Co-editor and/or Director of *The Documentary History of the Ratification of the Constitution.*

7. I am the co-editor of *The Constitution and the States: The Role of the Original Thirteen in the Framing and Adoption of the Federal Constitution* (Madison, 1988), *Federalists and Antifederalists* (Madison, 1989) and a number of forthcoming books concerning the Constitution and the Bill of Rights.

8. I am also the author of many scholarly articles and papers, including "The U.S. Constitution: A Product of 18th Century Theory and Practice."

9. My work as a professional historian includes the reading and evaluation of primary and secondary sources, primarily with respect to the drafting and ratification of the Constitution of the United States, in order to form opinions, draw inferences and make judgments as to what actually took place, what persons actually

believed, and how those beliefs are related to what actually happened.

II. The Sources

10. In preparing this affidavit, I have personally examined portions of the published reference works which are described below, and have verified that the photocopies of pages of those works, which are appended to this Affidavit as Exhibits A through G, are true and correct copies of the pages from which they were photocopied.

11. Citations to the exhibits include the letter of the Exhibit and the original page number of the reference work involved.

12. Each Exhibit contains notations in the margin to the left of each quoted or paraphrased statement in order to assist in locating the cited text.

13. Exhibit A consists of pages from the first volume of a four-volume anthology of historical documents entitled *The Founders' Constitution* (Chicago: University of Chicago Press, 1987), which states on the copyright page that one editor, Philip B. Kurland, "is the William R. Kenan, Jr., Distinguished Service Professor in the College and Professor in the Law School" at the University of Chicago, and that the other editor, Ralph Lerner, is "Professor in the Committee on Social Thought and in the College" at the University of Chicago (*See* Ex. A).

14. Exhibits B and C consists of pages from a multivolume biography of James Madison, which was written

by historian Irving Brant, and is recognized as the standard and most detailed biography of Madison. Exhibit B consists of pages from *James Madison: The Nationalist, 1780-1787* (Indianapolis: The Bobbs-Merrill Company, 1948) and Exhibit C consists of pages from *James Madison: Father of the Constitution, 1787-1800* (Indianapolis: The Bobbs-Merrill Company, 1950).

15. Exhibits D and E consist of pages from the standard compilation of *The Records of the Federal Convention of 1787* (New Haven: Yale University Press, 1911), which was edited by Max Farrand, a Professor of History in Yale University. Exhibit D consists of pages from volume I and Exhibit E consists of pages from volume II.

16. Exhibit F consists of pages from an edition of *The Federalist* (Middletown, Conn.: Wesleyan University Press, 1961), which was edited by Jacob E. Cooke.

17. Exhibit G consists of pages from an edition of Samuel Johnson's classic *A Dictionary of the English Language . . .* , which was published in London in 1786.

18. Paragraphs 18 through 20 express my opinions as a professional historian in the field of American Constitutional History with respect to the accuracy and reliability of the foregoing sources.

19. Each of the foregoing sources is recognized by professional historians in the field as an authoritative work.

20. Each of the sources involved is a type of work that is reasonably relied upon by professional historians in the field in making judgments, forming opinions and drawing inferences.

21. In my opinion, the accuracy and reliability of the foregoing sources cannot reasonably be questioned with respect to the substance and meaning of the passages that are quoted or paraphrased below.

22. I have personally compared the statements set forth below, with the pages of the Exhibits which are cited as their source, and have verified that each quotation or paraphrased statement accurately reflects the cited text and is consistent with the meaning and context of the relevant passage or passages that are cited.

23. In preparing this Affidavit, I also have personally examined my Affidavit Concerning the Original Understanding of the Concept of Liberty, and the Exhibits that are attached thereto, which are being submitted herewith.

III. The Drafting and Ratification of the Guarantee Clause

A. Prior to the Constitutional Convention

24. In April of 1787, prior to the convening of the Philadelphia Convention which drafted the Constitution of the United States, James Madison wrote a critique of the government of the United States which called for a national "guaranty to the States of their Constitutions & laws against internal violence." (Ex. A, 166-167)

25. Madison stated that his proposal was intended to assure the preservation of the "Republican Theory" that "Right and power . . . [are] vested in the majority." (Ex. A, 167).

26. Although Madison anticipated that threats to republican government and majority rule would come from domestic violence, he perceived a need to assure that a minority of "one third" could not, "in an appeal to force, be an overmatch for the majority." (Ex. A, 167).

27. In a "republican Government," Madison declared, "the majority however composed, ultimately give the law." (Ex. A, 169).

28. It is "the fundamental principle of republican Government," Madison added, "that the majority . . . are the safest Guardians of both Public Good and of private rights." (Ex. A, 168).

29. In this context, Irving Brant observes that Madison wrote to Virginia Governor Edmund Randolph and to George Washington in April of 1787 in order to present "the ideas which, amplified in detail but unaltered in substance, became the Virginia Plan upon which . . . the Constitution was built." (Ex. B, 416).

30. Brant notes that Madison, Randolph, Washington and four other men comprised the Virginia delegation to the Constitutional Convention. (Ex. C, 23).

31. According to Brant, the Virginians met, "[b]eginning May 17 . . . every day for two or three hours 'to form a proper correspondence of sentiment.' " (Ex. C, 23).

32. The Virginia Plan was developed "[o]ut of the consultations of these men," Brant observes, and "undoubtedly was written by Madison." (Ex. C, 23).

33. Brant adds that "the [Virginia] delegation was a unit" in its "devotion to government founded on the people." (Ex. C, 23).

B. During the Constitutional Convention

34. After the Constitutional Convention convened, Brant relates, "Governor Randolph presented [the Virginia Plan for the consideration of the delegates] on May 29." (Ex. C, 23; Ex. D, 20-22).

35. The Virginia Plan contained a proposal "that a Republican Government & the territory of each State, except in the instance of a voluntary junction of Government & territory, ought to be guaranteed by the United States to each State." (Ex. D, 22).

36. On June 11, 1787, Madison moved to amend the proposal to read, "The republican *constitutions* and the existing laws of each state, to be guaranteed by the United States." (emphasis in original omitted; emphasis added as noted; Ex. D, 206).

37. Mr. Randolph expressed support for the amendment "because a republican government must be the basis of our national union; and no state in it ought to have it in their power to change its government into a monarchy." (Ex. D, 206).

38. Although the Convention agreed to Madison's amendment, it was followed two days later by a new resolution, which read, "Resolved that a republican *constitution*, and its existing laws, ought to be guaranteed to each State by the United States." (emphasis added; Ex. D, 206, 227; *See* Ex. D, 235, 237).

39. When the new resolution to guarantee "a Republican *Constitution*" was debated, Randolph explained that it had two goals: (1) "to secure Republican Government" and (2) "to suppress domestic commotions." (emphasis added; Ex. E, 47).

40. Randolph then "urged the necessity of both these provisions." (Ex. E, 47).

41. Madison "moved to substitute 'that the Constitutional authority of the States shall be guarantied to them respectively agst. domestic as well as foreign violence.' " (Ex. E, 47-48).

42. Following a short discussion of Madison's motion, Randolph moved that it be amended by adding the phrase, " 'and that no State be at liberty to form any other than a Republican Govt.' " (Ex. E, 48).

43. Madison seconded Randolph's motion (Ex. E, 48).

44. James "Wilson moved, as a better expression of the idea, 'that a Republican form of Governmt. shall be guarantied to each State & that each State shall be protected agst. foreign and domestic violence." (Ex. E, 48-49).

45. Wilson's proposal being "well received," Madison and Randolph withdrew the motions they had made and the Wilson amendment was adopted. (Ex. E, 49).

46. The notes of the Committee of Detail reflect Randolph's view that one purpose of the Guarantee Clause is "to prevent the establishment of any government, not republican." (Ex. E, 148; *See* Ex. E, 129, 137).

47. The Committee of Detail reported the proposal to the Convention as a declaration that "[t]he United States shall guaranty to each State a Republican form of Government . . . . " (Ex. E, 177, 188).

48. When the Constitution was adopted, and submitted to the States for ratification as part of Article IV, Section 4, of the Constitution of the United States, the provision was modified to read that "[t]he United States shall guarantee to every State in this Union a Republican Form of Government . . . . " (Ex. E, 662).

C. Following the Constitutional Convention

49. Following the drafting of the Constitution in the summer of 1787, Madison and Alexander Hamilton emphasized the nexus between the concept of republican government and the principle of majority rule in the Federalist Papers.

50. In *The Federalist* No. 14, for example, Madison explained that "the great principle of representation" provides the "mechanical" means by which "the will of the largest political body may be concentred, and its force directed to any object, which the public good requires." (Ex. F, 84).

51. In *The Federalist* No. 58, Madison observed that, when representation in a legislative body is based upon population, as in the national House of Representatives, the actions of that body speak "the known and determined sense of a majority of the people." (Ex. F, 393).

52. "If a faction consists of less than a majority," Madison explained in *The Federalist* No. 10, "relief is

supplied by the republican principle, which enables the majority [in the legislature] to defeat its sinister views by regular vote." (Ex. F, 60).

53. Hamilton declared, in *The Federalist* No. 22, that the "fundamental maxim of republican government . . . requires that the sense of the majority should prevail." (Ex. F, 139).

54. Hamilton added that, whenever "more than a majority is requisite to a decision," the requirement has a "tendency to subject the sense of the greater number to that of the lesser number." (Ex. F, 140).

55. Hamilton concluded that the "real operation" of a rule that permits a minority to prevail over the wishes of the majority is "to substitute the pleasure, caprice or artifices of an insignificant, turbulent or corrupt junto, to the regular deliberations and decisions of a respectable majority." (Ex. F, 140).

56. In the *Federalist* No. 43, Madison emphasized the importance of the Guarantee Clause. (Ex. F, 291).

57. In that essay, Madison declared that, "[i]n a confederacy founded on republican principles, . . . the superintending government ought clearly to possess authority to defend the system against aristocratic or monarchical innovations." (Ex. F, 291).

58. According to Brant, Madison defined "an aristocracy" as " '[a] government resting on a minority . . . . ' " (Ex. B, 416).

59. An "aristocratic or monarchical innovation" would, by this definition, permit one or a few to govern. (Ex. F, 291).

60. Madison declared, in *The Federalist* No. 43, that "[t]he only *restriction*" that the Guarantee Clause imposes on the States is a requirement "that they shall not exchange republican for anti-republican Constitutions . . . . " (emphasis added; Ex. F, 292).

61. Madison also recognized, in the same essay, that "the interposition of the general government" might be necessary to preserve or restore "a pre-existing government of the form which is to be guaranteed." (Ex. F, 292).

IV. The Dictionary Definition of a "Republican Form of Government"

62. Samuel Johnson's Dictionary (1786 ed.) defines the word "constitution" as an "[e]stablished form of government." (Ex. G).

63. The same dictionary defines the word "form" as a "[p]articular model," a "[s]tated method," or an "established practice." (Ex. G).

64. Johnson's Dictionary also defines the word "republican" as "[p]lacing the government in the people." (Ex. G).

65. From the three preceding paragraphs, it is evident that a "republican form of government" was understood in 1786 as a "constitution" that "places the government in the people" by means of a "stated method" or in accord with an "established practice."

66. In addition, Johnson's Dictionary defines the word "guarantee" as an undertaking "to see stipulations performed." (Ex. G).

67. The Dictionary also defines the verb "to guaranty" as "[t]o undertake that stipulations shall be performed." (Ex. G).

V. The Usage of the Phrase "Form of Government" in the Early State Constitutions

68. The statements set forth in this subsection are based upon an examination of my Affidavit Concerning the Original Understanding of the Concept of Liberty and the sources appended to the Affidavit as Exhibits F and G.

69. The Exhibits to my Affidavit Concerning the Concept of Liberty are cited as "Kam. Aff. I, Ex. F" or "Kam. Aff. I, Ex. G."

70. In the period following the outbreak of the American Revolution, the States of Virginia, Maryland and North Carolina adopted written constitutions which consisted of two parts: (1) a Declaration of Rights; and (2) a "CONSTITUTION, OR FORM OF GOVERNMENT." (Capitals in original; Virginia, Kam. Aff. I, Ex. F, 6, 7; Maryland, Kam. Aff. I, Ex. G, 1686, 1691; North Carolina, Kam. Aff. I, Ex. G, 2787, 2789).

71. The New Hampshire Constitution of 1776 established "A FORM OF GOVERNMENT," but did not include a Declaration of Rights. (Capitals in original; Kam. Aff. I, Ex. G, 2451-2452).

72. The Massachusetts Constitution of 1780 consisted of a Declaration of Rights and "A CONSTITUTION OR FRAME OF GOVERNMENT." (Capitals in original; Kam. Aff. I, Ex. F, 11, 14).

73. The Pennsylvania Constitution of 1776 consisted of a Declaration of Rights and a "PLAN OR FRAME OF GOVERNMENT." (Capitals in original; Kam. Aff. I, Ex. G, 3081-3082, 3084).

74. In each of the six constitutions described in this subsection, the "FORM" or "FRAME OF GOVERNMENT" defined and allocated the powers of government.

75. In addition, each "FORM" or "FRAME OF GOVERNMENT" contained a prescription for legislative action which established a prescribed "method" or "practice" for the making of laws.

VI. Expert Opinion Concerning the Original Understanding of the Guarantee Clause

76. On the basis of the facts set forth in Parts II through V of this Affidavit, Parts II through VII of my Affidavit Concerning the Original Understanding of the Concept of Liberty, and my personal examination of the exhibits to each affidavit, I have formed the following opinions concerning the "original understanding" of the Guarantee Clause.

77. The usage of the phrases "form of government" and "frame of government" in six of the early state constitutions is consistent with the dictionary definition of a "republican form of government" that is stated in paragraph 65 because each constitution "placed the government in the people" by means of a "stated method" or in accord with an "established practice."

78. The primary means of "placing the government in the people" was a "stated method" for the making of

laws, which prescribed the steps that were necessary to enact a valid statute.

79. As my Affidavit Concerning the Original Understanding of the Concept of Liberty reflects, the "established practice" of the English parliament, the provincial assemblies in the American colonies, the legislatures established by the first eleven state constitutions, and the "republican" Constitution of the United States "placed the government in the people" by giving citizens a "right of representation" or a "right to participate in the legislature" through representatives of their own choosing.

80. My Affidavit Concerning the Original Understanding of the Concept of Liberty also reflects that there was a common element in the prescriptions for legislative action that governed the making of a law in each of the legislative bodies that is referred to in the preceding paragraph.

81. The "established practice," and the universally "stated method" for the making of a statute, provided for the citizens: (1) to participate in the drafting, consideration and enactment of each statute through their elected representatives in at least one branch of the legislature that was established to provide a representation of "the people"; and (2) to give or withhold their consent to the enactment of each law by at least a majority vote of the members present and voting in that branch of the legislature.

82. The "stated method" and "established practice" for the making of a law precluded the enactment of any statute without the concurrence and consent of the

elected representatives of the people in at least one branch of a legislature.

83. Under these circumstances, and the facts set forth in Parts II through V of this Affidavit, it is my opinion that a "republican form of government" was originally understood as a written constitution which "placed the government in the people" by means of a prescription for legislative action that required the concurrence and consent of at least a majority of the members present and voting, in at least one branch of the legislature that was representative of the citizens.

84. The dictionary definition of "guarantee," which is set forth in paragraphs 66 and 67 above, makes clear that the Guarantee Clause was understood as imposing an obligation on the United States to see stipulations performed. (Ex. G).

85. Accordingly, the Guarantee Clause represented an undertaking by the United States to see that "established practices" for the enactment of legislation, which were incorporated into the several state constitutions for the purpose of "placing government in the people," would be preserved and observed in the states.

86. In sum, the Guarantee Clause was originally understood as an affirmative undertaking to guarantee, to the citizens of each state, that the principle of majority rule would be preserved.

87. Conversely, the Guarantee Clause was originally understood as a prohibition or restriction against the adoption of any state procedure for the making of a law that would remove government from "the people" by

purporting to authorize the enactment of a statute by a minority.

88. Any procedure for legislation that dispenses with the "republican" principle that "the majority however composed, [must] ultimately give the law," is repugnant to the original concept of a "republican form of government." (*See* Ex. F, 169).

89. The original understanding of the Guarantee Clause makes clear that the Framers of the Constitution intended, by including the Clause in the Constitution, to prohibit States and State officers from infringing the aspect of liberty that is described in my Affidavit Concerning the Concept of Liberty as the "right of self-government."

90. Under the foregoing circumstances, the original understanding of the Guarantee Clause embodied what Justice Story described as the *"fundamental principle of a free government, and especially of a republican government,* that no laws ought to be passed without the cooperation and *consent* of the representatives of the people. . . . " (emphasis added) Kam. Aff. I, Ex. E, 396.

Dated: June 12, 1990

/s/ John P. Kaminski,
John P. Kaminski, Ph.D.

* * *

(Exhibits are Omitted)

* * *

CONSTITUTIONAL PROVISIONS INVOLVED

Article IV of the Constitution provides in pertinent part:

> Section 4. The United States shall guarantee to every state in this union a Republican form of government . . . .

The First Amendment to the Constitution provides in pertinent part:

> Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

The Fourteenth Amendment to the Constitution provides in pertinent part:

> Section 1 . . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Article V of the Wisconsin Constitution provided in pertinent part, prior to April 1990:

> Section 10. Every bill which shall have passed the legislature shall, before it becomes a law, be presented to the governor; if he approve, he shall sign it, but if not, he shall return it, with his objections, to the house in which it shall have originated, who shall enter the objections at large upon the journal and proceed to reconsider it. Appropriation bills may be approved in whole or in part by the governor, and the part approved shall become law, and the part objected to shall be returned in the same manner as

provided for other bills. If, after such reconsideration, two-thirds of the members present shall agree to pass the bill, or the part of the bill objected to, it shall be sent, together with the objections, to the other house, by which it shall likewise be reconsidered, and if approved by two-thirds of the members present it shall become a law.

As amended in April of 1990, Article V of the Wisconsin Constitution provides in pertinent part:

Section 10. (1)(a) Every bill which shall have passed the legislature shall, before it becomes a law, be presented to the governor.

(b) If the governor approves and signs the bill, the bill shall become law. Appropriation bills may be approved in whole or in part by the governor, and the part approved shall become law.

(c) In approving an appropriation bill in part, the governor may not create a new word by rejecting individual letters in the words of the enrolled bill.

(2)(a) If the governor rejects the bill, the governor shall return the bill, together with the objections in writing, to the house in which the bill originated. The house of origin shall enter the objections at large upon the journal and proceed to reconsider the bill. If, after such reconsideration, two-thirds of the members present agree to pass the bill notwithstanding the objections of the governor, it shall be sent, together with the objections, to the other house, by which it shall likewise be reconsidered, and if approved by two-thirds of the members present it shall become law.

(b) The rejected part of an appropriation bill, together with the governor's objections in

writing, shall be returned to the house in which the bill originated. The house of origin shall enter the objections at large upon the journal and proceed to reconsider the rejected part of the appropriation bill. If, after such reconsideration, two-thirds of the members present agree to approve the rejected part notwithstanding the objections of the governor, it shall be sent, together with the objections, to the other house, by which it shall likewise be reconsidered, and if approved by two-thirds of the members present the rejected part shall become law.

STATUTES INVOLVED*

42 U.S.C §1983 provides in relevant part:

> Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

Wis. Stat. 15.155(3) provides:

> (3) MINORITY BUSINESS DEVELOPMENT BOARD. There is created a minority business development board attached to the department of development under s. 15.03 consisting of members appointed by the governor for 2-year terms.

Wis. Stat. 15.157(1) provides in pertinent part:

> 15.157 Same; councils. (1) STRATEGIC PLANNING COUNCIL. The governor may create a strategic planning council in the department of development consisting of the governor or his or her designee; the secretary of administration or his or her designee; the secretary of development or his or her designee; the president of the university of Wisconsin system or his or her designee; and 13 public members who are not

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*The provisions of the Wisconsin Statutes consist of 12 of the 13 statutes that are included in the plaintiffs' motion for partial summary judgment. Wis. Stat. 144.24 has been omitted because it has been amended to restore the parts that the Governor vetoed.

public officers or employes. One will be appointed by the speaker of the assembly, one by the assembly minority leader, one by the majority leader of the senate and one by the senate minority leader . . . .

Wis. Stat. 46.48(19) provides in pertinent part:

(19) MULTIDISCIPLINARY PREVENTION AND TREATMENT TEAM FOR COCAINE FAMILIES. (a) If the department has developed and submitted a plan for a pilot project to the governor as provided in par. (b), it shall allocate $150,000 in fiscal year 1989-90 and $900,00 in fiscal year 1990-1991 to fund a multidisciplinary prevention and treatment team in Milwaukee county for cocaine-abusing women and their children . . . .

Wis. Stat. 48.355(6) provides in pertinent part:

(6) SANCTIONS FOR VIOLATION OF ORDER.

* * *

(d) The court may order any one of the following sanctions:

1. Placement of the child in a secure detention facility or juvenile portion of a county jail that meets the standards promulgated by the department of corrections by rule, for not more than 10 days and educational services consistent with his or her current course of study during the period of placement.

Wis. Stat. 49.19(11)(a)1.a. provides in pertinent part:

(11)(a)1.a. Monthly payments made under s. 20.435(7)(d) and (p) to persons or to families with dependent children shall be based on family size and shall be at 80% of the total of the

allowances under subds. 2 and 4 plus the following standards of assistance . . . .

Wis. Stat. 84.013(3) provides in pertinent part:

(3) The department may proceed with construction of the following major highway projects:

* * *

(xb) USH 151 between the south interchange with STH73 south of Columbus and USH 41 at Fond du Lac.

Wis. Stat. 121.02 provides in pertinent part:

121.02 School district standards. (1) Each school board shall:

* * *

[L] 5. Provide regular instruction in foreign language in grades 7 and 8 beginning in the 1994-1995 school year.

Wis. Stat. 121.10 provides in pertinent part:

121.10 Minimum state aid.

* * *

(3) If a school district is eligible to receive a payment under sub. (2)(a) or (c), the state shall pay the school district an amount determined by multiplying $400 by the membership instead of the amount determined under sub. (2)(a) or (c). The school district's property tax levy determined under s. 120.12(3) in previous year exceeded an amount equal to 107% of the average property tax levy determined under s. 120.12(3).

Wis. Stat. 144.442(1s) provides in pertinent part:

(1s) ENVIRONMENTAL REPAIR FEE FOR GENERATORS OF HAZARDOUS WASTE. (a) A generator of hazardous waste who is required to report annually on hazardous waste activities according to rules promulgated under s. 144.62(8)(b) shall pay an annual environmental repair fee.

(b) The annual environmental repair fee under par. (a) shall be assessed as follows:

1. A generator of hazardous waste shall pay a base fee of $100 if the generator has generated more than zero pounds in that particular year, plus $9 per ton of hazardous waste generated during the reporting year.

Wis. Stat. 144.445(8)(b) provides in pertinent part:

(b) Only the following items are subject to arbitration under this section:

* * *

1m. Reimbursement of reasonable costs, but not to exceed $20,000, incurred by the local committee relating to negotiation, mediation and arbitration activities under this section.

Wis. Stat. 157.70 provides in pertinent part:

157.70 Burial sites preservation.

* * *

[(2)(a)] In this paragraph, "sufficient contiguous land" means land that is within at least 5 feet from any part of a burial site.

Wis. Stat. 166.20(11)(b) provides:

(b) Any person who knowingly and wilfully fails to report the release of a hazardous substance covered under 42 USC 11004 as required under sub. (5)(a)2 or any rule promulgated under sub. (5)(a)2 shall:

1. For the first offense, be fined not less than $100 nor more than $25,000 or imprisoned for not more than 2 years or both.

2. For the 2nd and subsequent offenses, be fined not less than $200 nor more than $50,000 or imprisoned for not more than 2 years or both.

EXCERPTS FROM THE APPENDIX TO THE COMPLAINT WITH RESPECT TO THE VETOES INCLUDED IN PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT*

* * *

I. 1987 Senate Bill 100

1. Item D-41 Wis. Stat. 144.445 (8)(b)1m	* * *	amended statute by vetoing repeal of the "$2" in statute reading "$2,500"; deleting the "$4" in the "$40,000" amendment contained in the bill; and combining the "$2" from the statute, and "0,000" from the bill, to create a new maximum of "$20,000"
2. Item E-1 Wis. Stat. 49.19 (11)(a)1.a	* * *	amended statute to reduce AFDC benefits from 85% of the standard of need to "80%" of need, by vetoing the decimal and each numeral "4" in bill's proposal to cut benefits to "84.04%"
3. Item E-28 Wis. Stat. 48.355(6)	* * *	created a statute that authorizes incarceration for "ten days" by vetoing a "48 hour" limit in the bill; and creating a new "ten day" limit from "parts" of the 35 words that had followed "48 hours" in the text of enrolled bill

---

* Wis. Stat. 144.241 is omitted because it has been amended to restore the parts that the governor deleted. In addition, column two has been omitted.

II. 1989 Senate Bill 31

1. Item A-3 Wis. Stat. 121.02 (1)(L)5.	* * *	delayed start of new requirement from "1991-92" to "1994-95" by deleting "parts" and splicing the remaining "parts" in bill
	* * *	
3. Item A-16 Wis. Stat. 121.10(3)	* * *	created statutory mandate for increase in minimum school aids of $400,000 per year by deleting eligibility restrictions
4. Item A-27 Wis. Stat. 157.70(2)(a)	* * *	created statute providing 5 foot buffer zones by deleting first digit of the number "25" in bill
	* * *	
10. Item F-8 Wis. Stat. 15.155(3)	* * *	created statute giving governors authority to appoint all five Board members by deleting "parts" that gave others power to select 3 members
11. Item F-9 Wis. Stat. 15.157(1)	* * *	amended statute to give governors authority to appoint four new members to Council, by deleting "parts" allocating those appointments to certain legislative leaders
	* * *	
13. Item F-39 Wis. Stat. 144.442 (1s)(b)1.	* * *	imposed tax of $9 per ton on business generators of hazardous wastes by deleting first digit of the number "$19" in the bill

14. Item F-51 Wis. Stat. 84.013 (3)(xb)	* * *	created authorization to build 18 miles of freeway between Beaver Dam and Waupun by deleting text calling for termination of one segment "at Beaver Dam" and the beginning of a second segment "at Waupun"

* * *

IV. 1989 Assembly Bill 353

1. Section 21 Wis. Stat. 166.20 (11)(b)	* * *	created minimum fines of $100 for a first offense and $200 for second and subsequent offenses by deleting the comma and a zero from the text of the enrolled bill that would have set minimum fines of $1,000 and $2,000 for such offenses

V. 1989 October Special Session Assembly Bill 12

1. Item A-1 Wis. Stat. 46.48(19)	* * *	approved new $1 million program, but deleted explicit requirement that agency "must model" the new program after a similar "program in the state of Florida."

Supreme Court, U.S.
FILED
AUG 14 1991
OFFICE OF THE CLERK

No. 91-93 (2)

In The

Supreme Court of the United States

October Term, 1991

Senator FRED A. RISSER and
Representative DAVID M. TRAVIS,

Petitioners,

v.

TOMMY G. THOMPSON, Governor
of the State of Wisconsin,

Respondent.

**On Petition For a Writ of Certiorari
To The United States Court of Appeals
For The Seventh Circuit**

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

JAMES E. DOYLE
Attorney General of Wisconsin

F. THOMAS CREERON III
Assistant Attorney General
Counsel of Record

EDWARD S. MARION
Special Assistant
Attorney General

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-8549

Attorneys for Respondent

QUESTIONS PRESENTED

1. Is the governor of a state absolutely immune from suit under 42 U.S.C. § 1983 for actions taken in the exercise of the veto power?

2. Is an action to nullify state statutes barred by the eleventh amendment?

3. Do state legislators have standing to sue a governor over an exercise of the veto power which does not prevent them from voting to override?

4. Where, in a prior action for the same relief, petitioners chose not to raise available claims, and where granting them the relief they subsequently request would seriously disrupt the administration of government, are petitioners barred from bringing the subsequent action under the doctrines of laches and issue preclusion?

5. Is petitioners' claim that a governor's exercise of the veto power violates the United States Constitution's Guarantee Clause a non-justiciable question?

6. Where the entirety of petitioners' claims amount to a challenge to a state constitution's allocation of legislative

power among the branches of government, does the complaint fail to state a claim upon which relief can be granted?

7. Does the Wisconsin Constitution violate the Guarantee Clause because the Legislature cannot override a veto without a two-thirds vote regardless of whether the veto was "affirmative" or "negative" ?

8. Does the Wisconsin Constitution violate state legislators' first or fourteenth amendment rights because of the two-thirds override requirement?

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No. 91-93

In The

Supreme Court of the United States

October Term, 1991

Senator FRED A. RISSER and
Representative DAVID M. TRAVIS,

Petitioners,

v.

TOMMY G. THOMPSON, Governor
of the State of Wisconsin,

Respondent.

**On Petition For a Writ of Certiorari
To The United States Court of Appeals
For The Seventh Circuit**

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

JURISDICTIONAL STATEMENT

There is no case nor controversy under article III of the United States Constitution. In addition, petitioners' claims are barred, in part, by the eleventh amendment.

STATEMENT OF THE CASE

This is an action by two Wisconsin state legislators against the Governor of Wisconsin. Senator Risser and Representative Travis asked the district court to declare that the partial veto power of the Wisconsin Governor violates the United States Constitution and that Governor Thompson's exercise of his state constitutional power violated their civil rights. They sought an injunction against the future exercise of the partial veto power and the invalidation of previously partially-vetoed legislation. The district court denied their motion for partial summary judgment and granted the Governor's motion for complete summary judgment. The court of appeals affirmed.

Senator Risser sues as the president of the Wisconsin Senate, a member of the Democratic Party of Wisconsin, a member of the Senate Democratic Caucus and as a resident and taxpayer. Representative Travis sues as a member of the Wisconsin Assembly, a member of the Democratic Party of Wisconsin, a member of the Assembly Democratic Caucus and as a resident and taxpayer.

As members of the Legislature, petitioners participated in the passage of certain appropriation bills which were vetoed in part by Republican Governor Thompson pursuant to Wisconsin Constitution article V, section 10. Some of the vetoes alleged herein to be unconstitutional occurred in 1987. These vetoes were upheld by the Wisconsin Supreme Court in litigation instituted by Senator Risser and the Wisconsin Legislature. *Wis. Senate v. Thompson*, 144 Wis. 2d 429, 424 N.W.2d 385 (1988) (*"Veto I"*).

The people of Wisconsin ratified a constitutional amendment to the Governor's partial veto power on April 3, 1990. Senator Risser and Representative Travis were the lead sponsors of 1989 Wisconsin Senate Joint Resolution 11, which authorized the public referendum on the proposed amendment. The constitutional amendment only modestly cut back on the Governor's partial veto power by prohibiting the creation of a new word by the rejection of individual letters in the words of an appropriation bill. Wis. Const. art. V, § 10(1)(c). Although sponsored by Senator Risser and Representative Travis,

the amendment did not attempt to trim the Governor's veto power in any other respect (including the ability to veto digits, words and phrases, devices challenged by Senator Risser and the Legislature in *Veto I*, or what Senator Risser and Representative Travis characterize in this suit as "negative" vetoes).

The present litigation is not limited to the "creative" (and admittedly controversial) vetoes upheld in *Veto I*. Petitioners are challenging partial vetoes which are standard fare throughout the nation and which have been upheld in Wisconsin in the face of numerous legal challenges dating back to 1935.

REASONS FOR DENYING THE PETITION

I. THE PETITION PRESENTS NONE OF THE REASONS STATED IN SUP. CT. R. 10.

The decision of the court of appeals does not conflict with a decision of any other United States Court of Appeals on a similar subject. Neither does the decision conflict with any decision of this Court. On the contrary, the

decision is entirely consistent with the pronouncements both of this Court and the Seventh Circuit.

While novel and imaginative -- if not frivolous[1] --, petitioners' claims do not raise important questions of federal law.

II. PETITIONERS SUED THE WRONG PERSON.

As the court of appeals held, *Risser v. Thompson*, 930 F.2d at 551, petitioners sued the wrong person. As a government official exercising legislative power, the Governor is absolutely immune from suit under 42 U.S.C. § 1983. *See Supreme Court of Virginia v. Consumers Union, Etc.*, 446 U.S. 719, 731 (1980) (state high court judges are immune from suit when exercising their rule-making power); *Smiley v. Holm*, 285 U.S. 355, 369 (1932) (the veto of a governor is a part of the "legislative process").

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[1]The court of appeals held that petitioners' suit had "no possible merit." *Risser v. Thompson*, 930 F.2d 549, 551 (7th Cir. 1991).

No court that we know of has held that a governor exercising the veto power is not acting in a legislative capacity and so entitled to absolute immunity. The court of appeals in *Hernandez v. City of Lafayette*, 643 F.2d 1188, 1193–94 (5th Cir. 1981), held that a mayor was immune from a suit challenging his veto of a proposed city ordinance.

III. PETITIONERS RAISE A NON-JUSTICIABLE QUESTION.

Since *Luther v. Borden, et al.*, 7 How. 1 (1849), suits under article IV, section 4 of the United States Constitution (the Guarantee Clause) have been held non-justiciable. So well-established was the proposition that in *Taylor v. Beckham*, 178 U.S. 548, 578 (1900), the Court stated: "It was long ago settled that the enforcement of [the guarantee of a Republic form of government] belonged to [the Congress]." *Accord, O'Neill v. Leamer*, 239 U.S. 244, 248 (1915), *Pacific States Teleph. & Teleg. Co. v. Oregon*, 223 U.S. 118, 142–43 (1911).

Petitioners' effort to breathe justiciability back into the Guarantee Clause consists of arguing that *Baker v. Carr*, 369 U.S. 186 (1962), somehow forged an exception to *Luther v. Borden*. Yet *Baker v. Carr* itself held that Guarantee Clause disputes were non-justiciable as were other constitutional claims enmeshed therewith. *Baker v. Carr*, 369 U.S. at 216-26, 228.

IV. EVEN IF JUSTICIABLE, PETITIONERS' GUARANTEE CLAUSE CLAIM IS SO CLEARLY UNSUPPORTED THAT IT DOES NOT MERIT THIS COURT'S REVIEW.

This case is about the procedures for enactment of a state statute. This is a question of state law only. *Duncan v. McCall*, 139 U.S. 449, 461-62 (1891). Petitioners, state legislators, complain about the Wisconsin Constitution's allocation of power among the branches of state government. Such allocation is for Wisconsin to decide. *See Mayor of City of Phila. v. Educational Equality League*, 415 U.S. 605, 615 n.13 (1974) ("The Constitution does not

impose on the States any particular plan for the distribution of governmental powers").

Petitioners' argument about the peoples' right to be governed by their "representatives" overlooks the fact that the Governor is more a representative of the people of Wisconsin than is any legislator. The Court stated in *I.N.S. v. Chadha*, 462 U.S. 919 (1983), that the president represents all of the people because his constituency is nationwide. Similarly, the Governor represents all of the people of his state because his constituency is statewide. As the Court recently stated, elected judges are representatives of the people under the ordinary meaning of the word as describing "someone who has prevailed in a popular election." *Chisom v. Roemer*, 59 U.S.L.W. 4696, 4701 (June 20, 1991).

V. WISCONSIN'S PARTIAL VETO POWER DOES NOT VIOLATE ANY OTHER CONSTITUTIONAL PROVISION.

In *Davids v. Akers*, 549 F.2d 120, 124 (9th Cir. 1977), the court of appeals characterized claims similar to petitioners' as "nonsense" and their arguments as "non-sequiturs." Petitioners have cited no authorities calling into question this description.

CONCLUSION

Petitioners decry the advent of despotism in Wisconsin. The court of appeals responded:

> A government is not monarchical or aristocratic merely because its chief executive is empowered to cross out words in an appropriations bill. In analogizing the governor of Wisconsin to the kings of England, and the legislature of Wisconsin to the

> Parliaments that struggled against royal prerogative in the eighteenth century, the plaintiffs merely give analogy a bad name.

Risser v. Thompson, 930 F.2d at 552.

The petition should be denied.

Dated this 14th day of August, 1991.

JAMES E. DOYLE
Attorney General of Wisconsin

F. THOMAS CREERON III
Assistant Attorney General
Counsel of Record

EDWARD S. MARION
Special Assistant
Attorney General

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-8549

Attorneys for Respondent

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REPLY TO BRIEF IN OPPOSITION

FREDERICK B. WADE
Counsel of Record

Suite 804
122 West Washington Avenue
Madison, WI 53703
(608)255-5111

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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REPLY TO BRIEF IN OPPOSITION

ARGUMENT

1. The Petition presents important questions of federal law that warrant the attention of this Court. In fact, contrary to the respondent's brief (Br. 5), there are few questions, if any, that could be of greater importance. Those questions ask whether the Constitution, or the tradition of legislative freedom that underlies the doctrine of absolute legislative immunity, secures the right of the governed to give or withhold consent to the enactment of statutes.

The petitioners have demonstrated, by uncontroverted evidence, that *consent* to the enactment of statutes, given either in person, or by a majority of the legislators present and voting in a representative body, was the very essence of the concepts of liberty and self-government that gave birth to our nation. App. 44a-67a, 72a-83a; *See* Pet. 9-15. The respondent, like each of the lower courts that has dealt with this case, has chosen to ignore that evidence, and to treat the principle of *consent* to statute law as if it is no part of the history and tradition of our people.

Moreover, Wisconsin's repudiation of the principle of consent is not merely of local or regional importance. If one State may abandon the principle of consent to statute law, which Justice Story has described as a " 'fundamental principle of a free government, and especially of a republican government,' " any State may do so. *See* J. Story, *Commentaries on the Constitution*, 396 (1851) *quoted at* App. 64a-65a.[1]

2. The respondent asserts that the challenged vetoes, which are summarized at App. 92a-94a, are "standard fare throughout the nation." *See* Br. 4. There is no color of merit in the assertion. It does not appear that any other Governor in the nation has the power to compose

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[1] On August 8, 1991, Governor Thompson exercised 457 "part" vetoes, before giving his approval to the remnants of the 1991-93 state budget. A number of those vetoes have created provisions of statute law without the consent of the Legislature. The Governor has now used a total of 1,146 part vetoes of budget bills since 1987, compared to a total of 661 part vetoes for the five Governors who served between 1965 and 1987.

and enact provisions of statute law without the consent of the representatives of the people in the Legislature.

3. There is no color of merit to the claim that this litigation embraces more than "creative" vetoes, which are challenged in this action because they "create" provisions of statute law without the consent of the Legislature. *See* Br. 4. As the Court below recognized, this case arose because the Governor exercised "the partial veto power to create a law that the legislature did not consider, let alone enact . . . . " App. 11a.

The distinction between "creative" and "negative" vetoes is carefully delineated in the Petition. *See* Pet. 3-4. A "creative" veto has the effect of composing and *enacting* a provision of statute law that is either contrary to the manifest intent of the corresponding provision in the text of the enrolled bill, or that differs in a material respect from the corresponding provision in the text of the enrolled bill that the Legislature did consider and did agree to pass. *Id.*

4. The respondent repeats the assertion of the Court of Appeals that there is no merit in the petitioner's claims (Br. 5, n.1), but that assertion should be discounted. The claims described by the panel bear no resemblance to the questions that the petitioners presented. In fact, the word "*consent*", and the concept of "consent," do not even appear in the opinion of the Court below. *See* App. 1a-13a.

The Court mischaracterized the due process claim as a contention that "the [governmental] power that a public official has by virtue of his office is a form of 'liberty.' " *Compare* Pet. 20-22 *with* App. 11a. In fact, the claim rests

on the premise that the petitioners have a personal right, in their capacity as qualified voters who actually voted for representation in the legislature, to give or withhold *consent* to the enactment of statutes through a vote in a representative body, in which *consent* to enactment is expressed by at least a majority of the votes cast by quorum of the elected representatives. Pet. 5 n.2, 9-15, 20-22.[2]

Similarly, the Court disparaged the Guarantee Clause claim as an attempt to prove, by "analogy," that the government of Wisconsin is "monarchical or aristocratic" and that the Governor is comparable to "a hereditary prince" or "a dictator." App. 7a-8a. In fact, the petitioners contended, on the basis of historical evidence (*See* App. 56a-65a and 72a-83a), that Wisconsin has exchanged a "republican" *prescription for legislative action* for one that is "anti-republican," insofar as the executive may compose and enact statutes that do not have the *consent* of the representatives of the people in the Legislature. *Compare* Pet. 22-25 *with* App. 7a-8a.

Finally, the Court of Appeals treated the Equal Protection and First Amendment claims *as if* they involved nothing more than "the allocation of power between two branches of government." App. 9a-10a. In reality, these claims rest on the premise that the requirement of a two-thirds vote – for the purpose of rejecting a provision of statute law that has been composed and enacted by

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[2] As stated, the claim recognizes that qualified electors did not have an opportunity to exercise the personal right to give or withhold consent directly by voting in a referendum.

means of a "creative" veto – results in an unequal allocation of power *among members of the Legislature* (and the citizens of the districts that they represent). *Compare* Pet. 25-28 *with* App. 9a-10a. The Court below ignored the premise – namely, that the State's decision to establish *a legislature* gives each citizen a constitutionally protected right to participate in the legislative decision to give or withhold *consent* to the enactment of statutes *on an equal basis with other citizens. Id.*

5. The respondent's brief does not concede that deprivation of the right to give or withhold consent is the issue. As a result, it does not contain any substantive response to the arguments and evidence that the petitioners presented.

The brief ignores the petitioners' claim that they have a personal liberty interest in giving or withholding consent to the enactment of statutes, either personally, or through their representatives in the Legislature. In addition, it makes no attempt to refute any of the evidence that the Founders considered popular or legislative consent to the enactment of statutes to be a " 'fundamental principle of a free government, and especially of a republican government . . . . ' " App. 64a-65a; *See* Pet. 9-12; App. 44a-67a; App. 72a-83a.[3]

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[3] Contrary to the respondent (*See* Br. 6-7), *Baker v. Carr*, 369 U.S. 186 (1962), makes clear that there must be a case-by-case inquiry to determine whether there is a political question that renders a particular claim non-justiciable. While *Baker* recognizes that Guarantee Clause claims have often involved political questions, it does not foreclose the possibility that some will not. *Id.* at 222-223 n. 48, 229.

In the context of the First Amendment and the Equal Protection Clause, the respondent relies (Br. 9) on *Davids v. Akers*, 549 F.2d 120, 124 (9th Cir. 1977). However, that case rests on the premise that the complaining legislators had "*the usual right* of a member to speak *and vote* upon matters that come before the House . . . . " (emphasis added) *Id.* In other words, they had "*the usual right*" to give or withhold *consent* to a proposed course of action by a majority of the votes cast. Because deprivation of that "*usual right*" is precisely what gives rise to the petitioner's claims, there is no color of merit to the assertion that *Davids v. Akers* is relevant.

6. The respondent asserts that the petitioners have "sued the wrong person" because the Governor is entitled to legislative immunity. Br. 5. However, the brief does not contain any substantive response to the petitioners' argument that the immunity does not apply because the challenged vetoes fall outside the sphere of *legitimate* legislative activity. *Compare* Pet. 15-18 *with* Br. 5-6.

The Founders understood that an executive cannot be given a "power of legislation" without repudiating the fundamental principle that statutes require the *consent* of either the people themselves, or a majority of the legislators present and voting in a representative body. As James Iredell explained, prior to becoming a Justice of this Court:

> "The President has no power of legislation. If he does not *object*, the law passes by a bare majority; and if he *objects*, it passes by two thirds [assuming that the veto is overridden]. His

> power extends only to cause it to be *reconsidered. . . .* "

(emphasis added) 4 J. Elliot, *Debates in the Several State Conventions,* 27 (1901). Mr. Iredell concluded:

> "whether a law *passes* by a bare majority, or by two thirds, (which are required to *concur after* he shall have stated objections,) what gives active operation to it is, the will of the senators and representatives."

(emphasis added) *Id.; See* Pet. 17. In other words, it is the *consent* of the representatives of the people in the legislature that is necessary to give a statute "any validity, or binding force. . . . " *See* 1 H. Syrett *ed., The Papers of Alexander Hamilton* 105 (1961).

Without the consent of the people, given either in person, or through their representatives, there can be no legitimate exercise of legislative power. As James Wilson put it, a proposal becomes law "by the authority of the two houses of the legislature." J. McMaster and F. Stone, eds., *Pennsylvania and the Federal Constitution,* 335 (1888).[4]

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[4] The Wisconsin Constitution gives the Governor "[t]he executive power," and makes him responsible for seeing "that the laws be faithfully executed." Wis. Const. Art. V, sections 1 and 4. Accordingly, even if the respondent is entitled to immunity for acts performed in a legislative capacity, he is still a proper defendant. The Complaint seeks to nullify statutes that have been composed and enacted by "creative" use of the veto power (*See* App. 2a-3a), and that remedy would be equivalent to a prospective injunction against their enforcement and administration. *See Supreme of Virginia v. Consumers Union,* 446 U.S. 719, 736 (1980).

7. The respondent's brief emphasizes (Br. 3) that Senator Risser and Representative Travis "were the lead sponsors" of the 1990 constitutional amendment, which prohibits the Governor from "creat[ing] a new word by rejecting individual letters in the words of the enrolled bill." App. 85a. However, each of the petitioners testified, at his deposition, that the amendment did not go as far as he desired. *See* Risser Dep. 34; Travis Dep. 17.

Senator Risser testified that the amendment represented "a consensus of those of us who were interested. . . . " Risser Dep. 34. He added that "the consensus arrived at was that the public certainly could understand that creating new words by striking letters of old words was far and beyond any comprehension – even though our state Supreme Court said it was all right. . . . " *Id.* Representative Travis explained that "a political decision" was made as to what was necessary to get the amendment "through two houses of the legislature two different times and pass a statewide referendum." Travis Dep. 17.

8. The respondent implies (Br. 3-4) that a political remedy is feasible. However, the Wisconsin Supreme Court has repeatedly affirmed that the Governor may make "creative" use of the part veto. *See State ex rel. Wisconsin State Senate v. Thompson,* 144 Wis.2d 429, 439-443, 447-451; 424 N.W.2d 385, 388-390, 392-393 (1988). Governors of both major parties have used the power as a means of creating statutes that do not have the consent of the representatives of the people in the Legislature. *Id.; State ex rel. Sundby v. Adamany,* 71 Wis.2d 118, 237 N.W.2d 910 (1976) (Democrat Patrick Lucy); *State ex rel. Kleczka v. Conta,* 82 Wis.2d 679, 264 N.W.2d 539 (1978) (Democrat Martin Schreiber). Attorney Generals of both parties have

defended the practice in this case.[5] And the Legislature as a whole, in proposing the constitutional amendment that was adopted in 1990, failed to comprehend that there is an irreconcilable conflict between "creative" use of the veto and the principles of liberty and self-government that gave birth to our nation.

As John Dickinson observed, in the third of his *Letters From a Farmer In Pennsylvania*, "usurpations, which might have been successfully opposed at first, acquire strength by continuance, and thus become irresistible." F. McDonald, *ed.*, *Empire and Nation*, 16 (1962). There is no reasonable likelihood of a political remedy that will restore the principle that no statute may be enacted without the *consent* of either the people themselves, or a majority of the legislators present and voting in a representative assembly.

CONCLUSION

For the reasons set forth above, and in the Petition, the petitioners respectfully request that the Petition be granted.

Respectfully submitted,

FREDERICK B. WADE
Counsel of Record

Suite 804
122 West Washington Avenue
Madison, WI 53703
608-255-5111

[5] The respondent's brief is the first submitted in this action by Attorney General James Doyle, a Democrat who defeated his Republican predecessor in 1990.